No. 17-1672	
Title:	**United States, Petitioner** **v.** **Andre Ralph Haymond**
Docketed:	June 15, 2018
Linked with 17A1065	
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Numbers:	(16-5156)
Decision Date:	August 31, 2017
Rehearing Denied:	January 16, 2018
Questions Presented	

DATE	**PROCEEDINGS AND ORDERS**
Apr 03 2018	Application (17A1065) to extend the time to file a petition for a writ of certiorari from April 16, 2018 to May 16, 2018, submitted to Justice Sotomayor. **Proof of Service** **Main Document**
Apr 04 2018	Application (17A1065) granted by Justice Sotomayor extending the time to file until May 16, 2018.
May 03 2018	Application (17A1065) to extend further the time from May 16, 2018 to June 15, 2018, submitted to Justice Sotomayor. **Proof of Service** **Written Request**
May 03 2018	Application (17A1065) granted by Justice Sotomayor extending the time to file until June 15, 2018.
Jun 15 2018	Petition for a writ of certiorari filed. (Response due July 16, 2018) **Petition** **Proof of Service**
Jun 28 2018	Motion of Andre Ralph Haymond for an extension of time not accepted for filing (corrected version submitted). (June 29, 2018)
Jun 28 2018	Motion to extend the time to file a response from July 16, 2018 to August 15, 2018, submitted to The Clerk. **Main Document**
Jun 29 2018	Motion to extend the time to file a response is granted and the time is extended to and including August 15, 2018.

Aug 07 2018	Motion to extend the time to file a response from August 15, 2018 to September 14, 2018, submitted to The Clerk. **Main Document**
Aug 13 2018	Motion to extend the time to file a response is granted and the time is further extended to and including September 14, 2018.
Sep 13 2018	Brief of respondent Andre Ralph Haymond in opposition filed. **Main Document** **Main Document**
Sep 13 2018	Motion for leave to proceed in forma pauperis filed by respondent Andre Ralph Haymond. **Main Document**
Sep 26 2018	Waiver of the 14-day waiting period pursuant to Rule 15.5 filed by the Solicitor General. **Main Document**
Sep 26 2018	DISTRIBUTED for Conference of 10/12/2018.
Sep 26 2018	Reply of petitioner United States filed. (Distributed) **Proof of Service** **Main Document**
Oct 22 2018	DISTRIBUTED for Conference of 10/26/2018.
Oct 26 2018	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Oct 26 2018	Petition GRANTED.
Nov 19 2018	Motion for an extension of time to file the briefs on the merits filed. **Main Document**
Nov 20 2018	Motion to extend the time to file the briefs on the merits is granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 17, 2018. The time to file respondent's brief on the merits is extended to and including January 18, 2019.
Dec 06 2018	Motion to dispense with printing the joint appendix filed by petitioner United States. **Proof of Service** **Main Document**
Dec 17 2018	Brief of petitioner United States filed. **Proof of Service** **Main Document**
Dec 21 2018	SET FOR ARGUMENT for Tuesday, February 26, 2019.

Dec 21 2018	Brief amici curiae of States of Utah, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 07 2019	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 11 2019	Record requested from the U.S.C.A. 10th Circuit.
Jan 15 2019	CIRCULATED
Jan 16 2019	Record from the U.S.C.A. 10th Circuit is electronic and located on PACER. The record is complete.
Jan 18 2019	Brief of respondent Andre Ralph Haymond filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 25 2019	Blanket Consent filed by Respondent, Andre Ralph Haymond. **Blanket Consent**
Jan 25 2019	Brief amici curiae of FAMM and the National Association of Criminal Defense Lawyers filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 25 2019	Brief amicus curiae of Due Process Institute filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 25 2019	Brief amici curiae of Social Science and Law Scholars filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 01 2019	Letter Proposing Material for Lodging of Andre Ralph Haymond not accepted for filing. (Request withdrawn as record material received from Tenth Circuit. February 19, 2019)
Feb 14 2019	Reply of petitioner United States filed. (Distributed) **Main Document** **Proof of Service**
Feb 26 2019	Argued. For petitioner: Eric J. Feigin, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: William D. Lunn, Tulsa, Okla.

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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANDRE RALPH HAYMOND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding "unconstitutional and unenforceable" the portions of 18 U.S.C. 3583(k) that required the district court to revoke respondent's ten-year term of supervised release, and to impose five years of reimprisonment, following its finding by a preponderance of the evidence that respondent violated the conditions of his release by knowingly possessing child pornography.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ANDRE RALPH HAYMOND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 869 F.3d 1153. A prior opinion of the court of appeals is reported at 672 F.3d 948. The opinion of the district court (App., *infra*, 35a-69a) is not published in the Federal Supplement but is available at 2016 WL 4094886.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2017. A petition for rehearing was denied on January 16, 2018 (App., *infra*, 70a). On April 4, 2018, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including May 16,

2018. On May 3, 2018, Justice Sotomayor further extended the time to and including June 15, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Section 3583(k) of Title 18 provides:

> Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

18 U.S.C. 3583(k) (Supp. IV 2016).*

Other pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 71a-78a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Oklahoma, respondent was convicted on one count of possession and attempted possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). App., *infra*, 2a. The district court sentenced him to 38 months of imprisonment, to be followed by ten years of supervised release. *Ibid.* The court of appeals affirmed, 672 F.3d 948, and this Court denied review, 567 U.S. 923. The district court subsequently revoked respondent's supervised release and ordered five years of reimprisonment, to be followed by five years of supervised release. App., *infra*, 35a-69a. The court of appeals affirmed the revocation of supervised release but vacated the order of reimprisonment and remanded. *Id.* at 1a-28a.

1. In 2007, an undercover federal agent "caught [respondent] sharing child pornography files on * * * a peer-to-peer sharing network." App., *infra*, 37a. Agents subsequently "located seventy files containing child pornography" on respondent's computer. *Ibid.* Respondent admitted that he was "addicted to child pornography" and that he regularly downloaded and viewed pornographic images of children. *Ibid.*

A grand jury indicted respondent for possession and attempted possession of child pornography, in violation

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* Unless otherwise indicated, all references to 18 U.S.C. 3583 are to the 2012 edition of the United States Code, with amendments contained in the 2016 Supplement IV. The current version of the statute is identical in all material respects to the version of the statute in force at the time of respondent's sentencing.

of 18 U.S.C. 2252(a)(4)(B) and (b)(2). See 672 F.3d at 951. Respondent proceeded to trial, and a jury found him guilty based on his possession of seven images of child pornography. *Id.* at 953, 960.

2. The jury's finding of guilt exposed respondent to a sentence containing multiple component parts. Under 18 U.S.C. 2252(b)(2), respondent could "be fined * * * or imprisoned not more than 10 years, or both." In addition, 18 U.S.C. 3583(a) provides that the "court, in imposing a sentence to a term of imprisonment * * * may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment," and must do so "if such a term is required by statute." Under the first sentence of 18 U.S.C. 3583(k), "the authorized term of supervised release" for respondent's child-pornography offense—and for various other sex offenses and crimes against minors—"is any term of years not less than 5, or life."

Supervised release is "a form of postconfinement monitoring overseen by the sentencing court." *Johnson* v. *United States*, 529 U.S. 694, 697 (2000). Similar in many ways to parole (which it replaced in the federal system, see *id.* at 710-711), supervised release provides a conditional form of liberty to assist former prisoners "in their transition to community life," *id.* at 709 (citation omitted). "While on supervised release, the offender [is] required to abide by certain conditions, some specified by statute and some imposable at the court's discretion." *Id.* at 697; see 18 U.S.C. 3583(d). For example, every sentence including a term of supervised release must order, "as an explicit condition," that "the defendant not commit another Federal, State, or local crime during the term of supervision." 18 U.S.C. 3583(d).

A defendant's ability to remain out of prison during his term of supervised release is contingent upon his compliance with the conditions of that release. See *Johnson*, 529 U.S. at 709 (noting the possibility that a defendant "trie[s] liberty and fail[s]"). If the sentencing court, in overseeing a defendant's term of supervised release, "finds by a preponderance of the evidence that the defendant violated a condition of supervised release," the court may "revoke [the] term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision." 18 U.S.C. 3583(e)(3).

In *Johnson* v. *United States*, *supra*, this Court considered the nature of "postrevocation penalties" such as reimprisonment under 18 U.S.C. 3583(e)(3) after a violation of supervised-release conditions, or reimprisonment after a violation of parole conditions, and "attribute[d]" those penalties "to the original conviction." *Johnson*, 529 U.S. at 701. The Court explained that even though the "acts of violation" may be "criminal in their own right," a court's reliance upon them for supervised-release revocation and reimprisonment is "part of the penalty for the initial offense." *Id.* at 700.

3. The district court in this case sentenced respondent to 38 months of imprisonment, to be followed by ten years of supervised release, subject to "numerous conditions." App., *infra*, 37a. In addition to statutorily required conditions that respondent "not commit another Federal, State, or local crime during the term of supervision," 18 U.S.C. 3583(d), and register as a sex offender under the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. 20901 *et seq.* (formerly codified

at 42 U.S.C. 16901 *et seq.*), the court required respondent to participate in sex-offender treatment, disclose all Internet devices and passwords, install and pay for software allowing monitoring of his computer activity, and refrain from viewing or possessing child pornography, 1 C.A. App. 31-32.

Respondent appealed his conviction, but did not challenge his sentence. The court of appeals affirmed, 672 F.3d 948, and this Court denied review, 567 U.S. 923.

4. Following his discharge from prison, respondent failed to comply with numerous conditions of his supervised release, including registration as a sex offender, attendance at sex-offender treatment, and maintenance of monitoring software on his computer. App., *infra*, 38a. Respondent's probation officer "gave him a strict deadline for compliance" with the computer-monitoring condition, "which he did not meet." *Ibid.* Instead, respondent "bragged * * * that he could outsmart the monitoring software." *Ibid.* Probation officers then conducted a search of respondent's apartment, where they found computers that he had failed to report and a mobile phone that contained dozens of images of child pornography in its memory cache. *Id.* at 37a-45a.

After an evidentiary hearing, the district court found by a preponderance of the evidence that respondent had "committed five violations of his supervised release" by, *inter alia*, failing to comply with the computer monitoring condition, failing to participate in sex-offender treatment, and viewing child pornography. App., *infra*, 3a, 45a-46a. Of central relevance here, the court found by a preponderance of the evidence (but explicitly did not find beyond a reasonable doubt) that respondent, by knowingly possessing child pornography, had violated

his supervised-release conditions by engaging in conduct that would violate 18 U.S.C. 2252(a)(4)(B). App., *infra*, 3a, 45a-68a.

As previously discussed, the inherently conditional nature of supervised release incorporates the prospect of reimprisonment if the defendant proves unable to comply with the terms of that release. Under Section 3583(e)(3), any of respondent's violations could result in revocation of supervised release and reimprisonment for "all or part of the term of supervised release authorized by statute for the offense" of conviction. Revocation and reimprisonment under that provision would be subject to an "except[ion]," under which a defendant like respondent, whose supervised-release term stems from conviction of a class C felony, "may not be required to serve * * * more than 2 years in prison." 18 U.S.C. 3583(e)(3); App., *infra*, 14a.

Section 3583(k), which the district court applied when it imposed respondent's ten-year term of supervised release at sentencing, contains a more specific directive about the consequences of violating release conditions through certain specified conduct, including the knowing possession of child pornography. In particular, the second sentence of Section 3583(k) specifies the consequences when a defendant like respondent "required to register under [SORNA] commits any criminal offense under chapter * * * 110" of Title 18 punishable by longer than a year of imprisonment (which knowing possession of child pornography is). 18 U.S.C. 3583(k). In such a circumstance, "the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein." *Ibid.* The third sentence of Section 3583(k)

provides that "[s]uch term shall be not less than 5 years." *Ibid.*

The district court accordingly applied Section 3583(k) to respondent's violation of the conditions of his supervised release by knowingly possessing child pornography. See App., *infra*, 4a. Finding "no factor present that warrant[ed]" reimprisonment beyond the required five years, 3 C.A. App. 152, the district court ordered respondent to return to prison for five years, to be followed by five years of supervised release, *id.* at 153; see 18 U.S.C. 3583(h) (allowing for a term of supervised release to follow reimprisonment). The court noted its "serious concerns about" the requirement that respondent return to prison for at least five years after a revocation decision made "without a jury," but did not address any constitutional questions. App., *infra*, 50a-51a.

5. The court of appeals affirmed in part, vacated in part, and remanded. App., *infra*, 1a-28a. The court unanimously rejected respondent's challenge to the sufficiency of the evidence that he knowingly possessed child pornography, and it affirmed the district court's revocation of his supervised release. *Id.* at 4a-10a, 28a; see *id.* at 29a-31a (Kelly, J., concurring in part and dissenting in part). But a majority of the panel concluded that the case should be remanded for further proceedings in which only Section 3583(e)(3), and not Section 3583(k), would apply to the district court's imposition of additional consequences for the supervised-release violation. *Id.* at 28a. The majority excised, as "unconstitutional and unenforceable," the final two sentences of Section 3583(k), which require revocation of supervised release and reimprisonment for at least five years on a finding that a particular type of defendant has violated

supervised release by committing conduct corresponding to certain listed crimes. *Ibid.*; see *id.* at 26a-28a.

a. In the majority's view, Section 3583(k) "violates the Fifth and Sixth Amendments" for two reasons: "(1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range," and "(2) it imposes heightened punishment on sex offenders expressly based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt." App., *infra*, 15a.

As to the first rationale, the court of appeals acknowledged that this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Alleyne* v. *United States*, 570 U.S. 99 (2013)—which hold that any fact other than a prior conviction "that, by law, increases the penalty for a crime is an 'element' that must be submitted to a jury and found beyond a reasonable doubt," App., *infra*, 15a-16a (quoting *Alleyne*, 570 U.S. at 103)—apply only to "the criminal prosecution" and not to the revocation of supervised release, *id.* at 17a. "Revocation of supervised release," the court recognized, "is not part of the criminal prosecution, so defendants accused of a violation of the conditions of supervised release have no right to a jury determination of the facts constituting that violation." *Ibid.* (citing *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972)).

The majority concluded, however, that Section 3583(k) "violates the Sixth Amendment" under *United States* v. *Booker*, 543 U.S. 220 (2005), which applied *Apprendi* to the federal Sentencing Guidelines. App., *infra*, 21a. The majority reasoned that "[b]y requiring a mandatory term of reimprisonment, 18 U.S.C. § 3583(k) increases the minimum sentence to which a defendant

may be subjected." *Id.* at 20a. The court of appeals observed that "when [respondent] was originally convicted by a jury, the sentencing judge was authorized to impose a term of imprisonment between zero and ten years." *Ibid.* (citing 18 U.S.C. 2252(b)(2)). The court further observed that "[a]fter the judge found, by a preponderance of the evidence" that respondent had violated a condition of his supervised release, Section 3583(k) required respondent to serve "a term of reincarceration of at least five years." *Ibid.* In the majority's view, "[t]his unquestionably increased the mandatory minimum sentence of incarceration to which [respondent] was exposed from no years to five years," thereby "chang[ing] his statutorily prescribed sentencing range" without a jury finding beyond a reasonable doubt. *Id.* at 20a-21a (footnote omitted).

As to the second rationale for its constitutional holding, the court of appeals did not dispute that "committing any crime" could permissibly result in respondent's reimprisonment for up to two years under Section 3583(e)(3). App., *infra*, 22a. But the court took the view that Section 3853(k) "impermissibly requires a term of imprisonment based * * * on the commission of a new offense—namely 'any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed.'" *Ibid.* (quoting 18 U.S.C. 3583(k)). The majority reasoned that "[b]y separating [certain] crimes from other violations, § 3583(k) imposes a heightened penalty" that does not depend on the original offense, and "must be viewed, at least in part, as" imposing "punishment for the subsequent conduct" rather than the original offense. *Id.* at 23a. Viewed in that manner, the court concluded, Section 3583(k) invites the double-

jeopardy and jury-trial concerns that this Court avoided in *Johnson* by treating supervised-release revocation as punishment for the original offense. *Id.* at 21a-22a.

b. Judge Kelly dissented from the majority's invalidation of the second and third sentences of Section 3583(k), warning against "jump[ing] ahead of the Supreme Court when it has already spoken on this issue." App., *infra*, 34a; see *id.* at 31a-34a.

Judge Kelly "disagree[d]" with the conclusion, underlying the majority's first constitutional holding, that *Booker* "applies to revocation proceedings." App., *infra*, 31a. He observed that respondent "was tried and found guilty beyond a reasonable doubt of the original offense"; that "those jury-found facts supported the sentence imposed"; that *Booker* had "applied to that sentence"; and that respondent had been "instructed that supervised release would be part of that sentence and that there were certain restrictions he had to abide by lest his supervised release be revoked." *Ibid.* "That the full panoply of rights were guaranteed to [respondent] during his initial criminal proceeding," Judge Kelly explained, "does not mean that they attach once more during a revocation proceeding," which "is neither part of th[e] criminal prosecution nor is it a new criminal prosecution." *Id.* at 31a-32a; see *id.* at 31a (citing *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973)). Judge Kelly found the majority's view that *Booker* would apply to such a proceeding, even though *Apprendi* and *Alleyne* would not, to be "hard to understand * * * under current precedent." *Id.* at 32a.

Judge Kelly additionally observed that this Court "answered the [majority's] second objection to" Section 3583(k) by holding in *Johnson* that "revocation of supervised release is not 'punishment for the violation of

the conditions of supervised release.'" App., *infra*, 32a. He accordingly criticized the majority for "fail[ing] to take the Supreme Court at its word." *Ibid.* And he explained that "under the 'breach of trust' theory applicable to the revocation of supervised release," wherein "'the nature of the conduct leading to the revocation [can] be considered in measuring the extent of the breach of trust,'" Congress "can determine that the commission of certain crimes constitutes a more serious breach of trust warranting a longer term of revocation." *Id.* at 33a (quoting Sentencing Guidelines Ch. 7, Pt. A, intro. 3(b)) (brackets in original). He accordingly would have affirmed the district court's reimprisonment of respondent for five years. *Id.* at 34a.

6. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 70a.

REASONS FOR GRANTING THE PETITION

The divided decision below struck down, apparently on their face, multiple portions of a federal statute that plays an important role in protecting the public from harm. The majority's view that the invalidated provisions cannot constitutionally be applied is premised on a novel interpretation of the Fifth and Sixth Amendments (and the supervised-release statute itself) at odds with their text and history, the precedents of this Court, and the statements of other courts of appeals. Nothing in the Constitution requires jury findings beyond a reasonable doubt as a prerequisite to the implementation or administration of a previously imposed sentence. This Court should grant certiorari to correct the court of appeals' error on this significant and recurring question of federal law.

A. The Court Of Appeals Erred In Holding Substantial Portions Of 18 U.S.C. 3583(k) To Be Unconstitutional And Unenforceable

The court of appeals held that the second and third sentences of 18 U.S.C. 3583(k) violated respondent's Fifth and Sixth Amendment rights by requiring the district court, based on its finding that he violated a condition of his release by knowingly possessing child pornography, to revoke his ten-year term of supervised release and return him to prison for at least five years. App., *infra*, 15a-21a. As the dissenting judge recognized, *id.* at 31a-34a, the majority's rationales for that holding are erroneous. The decision below expanded the right to a jury, which expressly applies only to a criminal prosecution, into a right that applies to the administration of the sentence that criminal prosecution produced. The majority then compounded that error by not allowing the government to seek the findings that its constitutional holding would require, and instead simply striking down the lion's share of a federal statute.

1. The district court's enforcement of the conditions of respondent's supervised release under Section 3583(k) did not require a jury finding beyond a reasonable doubt

The district court's factual finding that respondent knowingly possessed child pornography provided a constitutionally sufficient basis for enforcing the conditions of his previously imposed term of supervised release under Section 3583(k).

a. The Sixth Amendment guarantees the right to a jury "[i]n all criminal prosecutions." U.S. Const. Amend. VI. In a series of decisions beginning with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court has clarified the scope of the Sixth Amendment's jury-trial right and

the "companion right" under the Fifth Amendment to have the jury find each element of a crime "beyond a reasonable doubt." *Id.* at 478; see, *e.g.*, *Alleyne* v. *United States*, 570 U.S. 99 (2013); *United States* v. *Booker*, 543 U.S. 220 (2005). Under those precedents, "the essential * * * inquiry is whether a fact is an element of the crime." *Alleyne*, 570 U.S. at 114. A fact is treated as an "element of the crime" if it "'increase[s] the prescribed range of penalties to which a criminal defendant is exposed.'" *Id.* at 111 (quoting *Apprendi*, 530 U.S. at 490).

Applying that rule, this Court has determined that facts increasing a statutory maximum penalty, a statutory minimum penalty, or a mandatory sentencing guidelines range must be found by a jury beyond a reasonable doubt. See *Apprendi*, 530 U.S. at 490 (statutory maximum); *Alleyne*, 570 U.S. at 116 (statutory minimum); *Booker*, 543 U.S. at 230-244 (mandatory sentencing guidelines range). The Court has also concluded that facts triggering imposition of "sentences of criminal fines" must be found by a jury, in light of "historical evidence showing that juries routinely found facts that set the maximum amounts of fines" for a given offense. *Southern Union Co.* v. *United States*, 567 U.S. 343, 346, 358 (2012). But "the Court has not extended the *Apprendi* * * * line of decisions beyond the offense-specific context that supplied the historic grounding for the decisions." *Oregon* v. *Ice*, 555 U.S. 160, 163 (2009). Thus, the determination of whether a defendant must serve multiple sentences consecutively or concurrently —"a sentencing function in which the jury traditionally played no part"—does not require findings by a jury beyond a reasonable doubt. *Ibid.*

b. The jury-trial and related due process rights underlying the *Apprendi* line of decisions do not extend to

the district court's order revoking respondent's ten-year term of supervised release and returning him to prison for five years under 18 U.S.C. 3583(k).

The Sixth Amendment applies only to "criminal prosecutions," a term that does not include implementing an already imposed sentence by revoking supervised release and returning a defendant to prison. In describing the "foundation" of the jury trial right, *Apprendi* looked to the historical scope of "criminal proceedings," listing for that purpose "indictment," "trial by jury," and "judgment by court," which it described as corresponding to "the imposition of sentence." 530 U.S. at 478 & n.4. Revocation of supervised release does not fit into any of those stages and accordingly does not implicate the "historic jury function" of "determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." *Ice*, 555 U.S. at 163.

Respondent's "criminal prosecution" ended with the "imposition" of his sentence for possession of child pornography. *Apprendi*, 530 U.S. at 478 n.4. That sentence required him to serve 38 months in prison, to be followed by ten years of supervised release. App., *infra*, 2a. The district court's much later finding that respondent had violated the conditions of his supervised release and accordingly must return to prison for five years as required by Section 3583(k) did not impose a new sentence; it merely administered the sentence respondent had already received. See *Ice*, 555 U.S. at 168 (judicial decision to "administer[]" already imposed sentences consecutively rather than concurrently did not implicate Sixth Amendment rights).

The fact requiring respondent's revocation and reimprisonment—his knowing possession of child pornog-

raphy while on supervised release—arose after the criminal prosecution ended, while he was already serving the resulting sentence. This Court has never applied *Apprendi* to a fact that does not exist until well after the criminal trial has concluded, the jury has been dismissed, and sentence has been imposed. For purposes of the "criminal prosecution[]," U.S. Const. Amend. VI, it is impossible for a not-yet-extant fact to be "an element of a distinct and aggravated crime" that must "be submitted to the jury and found beyond a reasonable doubt," *Alleyne*, 570 U.S. at 116. Respondent's possession of child pornography while on supervised release is instead a fact that relates solely to the implementation of the sentence that the now-disbanded jury's findings authorized.

The district court's application of Section 3583(k) to respondent was constitutional. The jury's conviction of respondent for violating 18 U.S.C. 2252 indisputably authorized a term of supervised release of five years to life. See 18 U.S.C. 3583(k); see also App., *infra*, 27a (finding no constitutional infirmity with that portion of Section 3583(k)). And supervised release, by its nature, is conditional and carries the possibility of reimprisonment if its terms are violated. See *Johnson* v. *United States*, 529 U.S. 694, 700 (2000) (observing that "violations often lead to reimprisonment"). Here, respondent received a ten-year term of supervised release, during which he was entitled to remain outside of prison only so long as he complied with the explicit conditions of that release. After respondent violated those conditions, the district court, in its role as the "oversee[r]" of respondent's sentence, *id.* at 697, constitutionally applied Section 3583(k) to effectively modify that ten-year

term to consist of five years of reimprisonment followed by five years of supervised release.

c. History and precedent confirm that the revocation of respondent's supervised release, and his attendant reimprisonment, are not part of the criminal prosecution and do not require a jury finding beyond a reasonable doubt. See *Southern Union*, 567 U.S. at 353 (explaining that application of *Apprendi* requires a court "to examine the historical record").

The federal government "has long kept track of former federal prisoners" through supervised release and its predecessor, parole. *United States* v. *Kebodeaux*, 570 U.S. 387, 396-397 (2013); see *Johnson*, 529 U.S. at 710. Those systems of provisional release have never required findings of fact by a jury beyond a reasonable doubt before a former prisoner's "conditional liberty" may be revoked. *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972). And because juries have "played no role in" revocation and reimprisonment decisions, judicial factfinding in that context represents "no encroachment * * * by the judge upon facts historically found by the jury," or upon the jury's "traditional domain." *Ice*, 555 U.S. at 168-169; see *id.* at 170 (noting that "the scope of the constitutional jury right must be informed by the historical role of the jury at common law").

Parole and supervised release trace their roots to England's penal colonies in Australia, where officials had authority to grant prisoners "conditional pardons" as early as 1790. 4 U.S. Dep't of Justice, *Attorney General's Survey of Release Procedures: Parole* 11 (1939). That authority evolved into the power to grant a "ticket-of-leave," which allowed a prisoner to earn conditional release for good behavior, but which could be revoked

for misconduct. *Ibid.* States began adopting parole systems in the 19th century. *Id.* at 19. Under a program instituted by a New York reformatory in 1876, "prisoners remained under the supervision of the reformatory for a period of 6 months, during which time their paroles could be revoked if they violated any of the conditions attached to their releases." *Id.* at 19-20; see *Morrissey*, 408 U.S. at 477 (describing evolution of parole).

In 1910, Congress enacted the Parole Act, ch. 387, 36 Stat. 819, which authorized the release of a federal prisoner who had served a portion of his sentence if a parole board found "a reasonable probability that" the prisoner would "live and remain at liberty without violating the laws." §§ 1, 3, 36 Stat. 819. Release on parole was subject to "such terms and conditions" as the parole board "shall prescribe." *Id.* § 3, 36 Stat. 820. A parolee remained "under the control of the warden," who was authorized to "retak[e]" the parolee upon "reliable information that [he] has violated his parole." *Id.* §§ 3, 4, 36 Stat. 820. The parole board could then "revoke" parole and require the prisoner to "serve the remainder of the sentence originally imposed," with no reduction for "the time the prisoner was out on parole." *Id.* § 6, 36 Stat. 820; see *Anderson* v. *Corall*, 263 U.S. 193, 195-196 (1923) (describing revocation of federal parole).

Consistent with long historical practice, this Court held in *Morrissey* v. *Brewer*, *supra*, that "revocation of parole is not part of a criminal prosecution," because it "arises after the end of the criminal prosecution, including imposition of sentence." 408 U.S. at 480. Accordingly, the Court explained, "the full panoply of rights due a defendant in" a criminal prosecution "does not apply to parole revocations." *Ibid.*; cf. *Samson* v. *California*, 547 U.S. 843, 852 (2006) (holding that parolees have

"severely diminished" Fourth Amendment rights "by virtue of their status alone"). Although a parolee facing revocation is entitled under the Due Process Clause to a hearing before a "'neutral and detached' hearing body such as a traditional parole board," he is not entitled to adjudication by "judicial officers or lawyers," *Morrissey*, 408 U.S. at 489—much less a trial by jury. This Court has likewise held that "there is no right to a jury trial" before revocation of probation—a similar form of conditional liberty. *Minnesota* v. *Murphy*, 465 U.S. 420, 435 n.7 (1984); see *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973) ("Probation revocation, like parole revocation, is not a stage of a criminal prosecution."); see also *United States* v. *Knights*, 534 U.S. 112, 120 (2001) (observing that probationers "face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt * * * do not apply").

Those holdings about the revocation of parole and probation apply equally in the materially indistinguishable context of the revocation of supervised release. Cf. *Samson*, 547 U.S. at 850 (extending constitutional rule from probation to parole and noting similarity of supervised release). Congress adopted supervised release in 1984 as an incremental improvement on the closely related parole system that it replaced. See *Johnson*, 529 U.S. at 709-711; see also Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, § 212(a)(2), 98 Stat. 1987, 1999. Like parole, supervised release provides "limited liberty" to assist former prisoners "'in their transition to community life,'" while at the same time protecting the public and encouraging law-abiding behavior by providing mechanisms for revoking that

conditional liberty. *Johnson*, 529 U.S. at 709, 712 (citation omitted). And in accord with *Morrissey* and past practice, Congress specified that violations of supervised release that "lead to" revocation and "reimprisonment * * * need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Id.* at 700; see 18 U.S.C. 3583(e)(3).

d. The majority below explicitly acknowledged that "[r]evocation of supervised release is not part of a criminal prosecution, so defendants accused of a violation of the conditions of supervised release have no right to a jury determination of the facts constituting that violation." App., *infra*, 17a; see *id.* at 19a n.1. The majority nevertheless reasoned that *Booker* prescribed relevant limitations that would "appl[y] to all sentencing proceedings, including the imposition of a subsequent term of imprisonment following revocation of supervised release." *Id.* at 19a. That reasoning is unsound.

The rule adopted in *Booker* does not exist apart from the Sixth Amendment. As the majority acknowledged "*Booker* itself relied on the Sixth Amendment." App., *infra*, 20a n.1; see *Booker*, 543 U.S. at 226 ("The question presented in each of these cases is whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment."). Accordingly, the court of appeals' acknowledgment that "the Sixth Amendment's protections cannot be directly invoked" in the context of supervised-release revocation, App., *infra*, 19a n.1, should have foreclosed any application of *Booker*.

The majority below erred in viewing the proceedings at issue in this case as constitutionally indistinguishable from the proceedings at issue in *Booker*. The proceed-

ings at issue in *Booker*—the initial imposition of a sentence following a criminal conviction, see 543 U.S. at 227-228—were unquestionably part of a "criminal prosecution" for Sixth Amendment purposes. Although "proceedings for violations of supervised release" are sometimes referred to as "sentencing" or "resentencing" proceedings, *Johnson*, 529 U.S. at 702, 708, such a proceeding "is not * * * a precise reenactment of the initial sentencing," *id.* at 712. Whatever nomenclature might be used to describe it, a supervised-release revocation proceeding remains a postjudgment proceeding aimed at determining the appropriate consequences for the defendant's violation of the conditions under which he had been allowed to serve part of his sentence outside of a prison. It is neither a replacement for, nor a continuation of, the original sentencing. Cf. *Dillon* v. *United States*, 560 U.S. 817, 828 (2010) (holding that *Booker* does not apply to postjudgment sentence-modification proceedings under 18 U.S.C. 3582(c)(2)).

The majority below thus had no basis to view the five-year minimum period of reimprisonment for a supervised-release violation required by Section 3583(k) as an "increase[]" above the zero to ten-year "term of imprisonment" that "the sentencing judge was authorized to impose" at respondent's original sentencing. App., *infra*, 20a. The judge imposed a term of imprisonment between zero and ten years—38 months—at the original sentencing, and respondent completed that term. *Id.* at 2a. But the judge at the original sentencing also separately imposed a ten-year term of supervised release, which respondent began serving after his discharge from prison. *Ibid.* The proceeding in this case was an administration of that supervised release—namely, a retraction of respondent's conditional liberty

—not a new sentence that would override the already completed original 38-month prison term.

To the extent the majority below viewed a jury finding as necessary to trigger the five-year minimum period of reimprisonment under 18 U.S.C. 3583(k), rather than the zero to two-year term of reimprisonment authorized by 18 U.S.C. 3583(e)(3), that view was equally mistaken. Because the revocation and reimprisonment were part of the implementation, rather than the imposition, of respondent's sentence, they were not part of the "criminal prosecution," and the right to a jury finding beyond a reasonable doubt therefore does not apply. The majority below did not dispute that a judicial finding by a preponderance of the evidence would be sufficient to authorize at least *some* reimprisonment—namely, reimprisonment under Section 3583(e)(3). See, *e.g.*, App., *infra*, 15a, 28a. The constitutional sufficiency of such a finding cannot be a function of the *particular* range that Section 3583(e)(3) specifies, which Congress had the power to set at a higher level. And that is exactly what Congress did in Section 3583(k).

Nothing in the *Apprendi* line of cases suggests that alternative ranges, applicable in the same context, might require *different* standards of proof. To the contrary, the central teaching of *Apprendi* is that the *same* standard applies to each. During the criminal prosecution, an "aggravated crime" and the "core crime" both require a jury finding of each element (other than a prior conviction) beyond a reasonable doubt. *Alleyne*, 570 U.S. at 113. The element that makes the crime "aggravated," rather than "core," does not require proof by some yet higher standard; the point is instead that the aggravating element should be treated the same as the

others. *Ibid.* As the court of appeals recognized, judicial findings by a preponderance of the evidence are generally sufficient in the context of a supervised-release revocation, which is outside the criminal prosecution. App., *infra*, 19a n.1. Nothing in *Apprendi* or its progeny supports applying that standard to reimprisonment under Section 3583(e)(3), but a more stringent standard to reimprisonment under Section 3583(k), simply because the latter requires a higher range. The contrary view of the majority below, therefore, not only improperly extended the *Apprendi* rule to a proceeding in which it textually, historically, and jurisprudentially does not apply—it was also based on an erroneous understanding of that rule.

2. The application of Section 3583(k) did not unconstitutionally punish respondent for new criminal conduct

The fact that Section 3583(k)'s application is triggered by a supervised-release violation that corresponds to one of several listed criminal offenses does not change the constitutional analysis.

As this Court recognized in *Johnson*, "[w]here the acts of violation [of supervised-release conditions] are criminal in their own right, they may be the basis for separate prosecution." 529 U.S. at 700. In such a separate prosecution, which would provide the predicate for a separate criminal punishment, the jury trial and related due process rights discussed in *Apprendi* would of course apply. But in the context of supervised-release revocation, the Court has construed the consequences of the defendant's violation as "part of the penalty for the initial offense," not a new one. *Ibid.*

The possibility of *independent* prosecution and punishment does not transform the district court's supervision of respondent's *preexisting* punishment into a

criminal prosecution. It would make little sense for a judicial finding to allow for revocation of supervised release and reimprisonment only when the conduct is *not* serious enough to match the definition of a criminal offense. The Constitution cannot reasonably be construed to permit revocation and reimprisonment based on a judicial finding of (for example) failure to attend mandatory counseling, but to forbid revocation and reimprisonment based on a judicial finding of (for example) sexual abuse of a child.

The majority below acknowledged as much. It recognized that a judicial finding that a defendant "commit[ted] a[] crime" can provide the basis for revocation of supervised release and reimprisonment under Section 3583(e)(3). App., *infra*, 22a. It believed, however, that a different rule applies to revocation of supervised release and reimprisonment under Section 3583(k). In its view, Section 3583(k) impermissibly punishes new criminal conduct because it does not apply to all supervised-release violations that correspond to criminal offenses (as Section 3583(e)(3) does), but instead applies only to supervised-release violations that correspond to the particular listed criminal offenses. See *id.* at 23a.

That reasoning is flawed. As a threshold matter, it runs counter to this Court's own reasoning in *Johnson*, which "attribute[d] postrevocation penalties to the original conviction" precisely to *avoid* the constitutional difficulties that the view of the majority below invites. 529 U.S. at 701; see *id.* at 700-701. In any event, as the dissenting judge below recognized, "Congress can determine that the commission of certain crimes constitutes a more serious breach of trust warranting a longer term of revocation." App., *infra*, 33a. Nothing requires

that every possible supervised-release violation result in reimprisonment for the exact same length of time. This Court has viewed "postrevocation sanctions as part of the penalty for the initial offense," *Johnson*, 529 U.S. at 700, notwithstanding that the sanctions are indeterminate and thus may turn in part on factors such as the severity of the violation and its relationship to the original offense of conviction, see, *e.g.*, *id.* at 697, 712; see also Sentencing Guidelines § 7B1.1 (classifying supervised-release violations based on seriousness of the defendant's conduct). The fact that Congress has codified its own judgments about the appropriate amount of reimprisonment in certain circumstances does not transform a supervised-release-revocation proceeding into a criminal prosecution.

3. Section 3583(k) can be enforced even if the jury trial and related due process rights apply

After erroneously finding major portions of Section 3583(k) "unconstitutional," the court of appeals committed an additional error by deeming them "unenforceable." App., *infra*, 28a. As the majority below recognized, a court that has found part of a federal statute unconstitutional "must 'refrain from invalidating more of the statute than is necessary.'" *Id.* at 26a (quoting *Booker*, 543 U.S. at 258). Even if the decision below were correct that revocation and reimprisonment under Section 3583(k) are unconstitutional in the absence of a jury finding beyond a reasonable doubt, the appropriate remedy would have been to require such a finding as a prerequisite to enforcement of the statute. It was not "'necessary'" to find the statute "unenforceable." *Id.* at 26a, 28a.

This Court's approach in *Southern Union* is instructive. The Court there concluded that facts justifying the imposition of particular criminal fines must be found by

a jury beyond a reasonable doubt. 567 U.S. at 360. The Court did not, however, find the statute at issue unenforceable. The Court instead held "that the rule of *Apprendi* applies to the imposition of criminal fines" and remanded for further proceedings consistent with its opinion. *Ibid.*; cf. *United States* v. *O'Brien*, 560 U.S. 218, 235 (2010) (holding that statutory sentencing enhancement provision required submission of facts to the jury, not that the provision was unenforceable); *Jones* v. *United States*, 526 U.S. 227, 251-252 (1999) (similar). At a minimum, the majority below should have adopted a similar course, and allowed the United States to continue enforcing the statutory provisions that Congress enacted in a way that complies with the majority's understanding of the Constitution.

Nothing in the text of Section 3583(k) precludes such a remedy. Section 3583(k) requires a court to "revoke the term of supervised release and require the defendant to serve a term of imprisonment under" Section 3583(e)(3) when the defendant has engaged in certain conduct. 18 U.S.C. 3583(k). Section 3583(e)(3), in turn, authorizes revocation and reimprisonment based on a judicial finding "by a preponderance of the evidence," in accordance with the Federal Rules of Criminal Procedure. 18 U.S.C. 3583(e)(3); see *Johnson*, 529 U.S. at 700; Fed. R. Crim. P. 32.1(b). A constitutional requirement of a jury finding beyond a reasonable doubt is not incompatible with the statutory requirement of a finding by a judge by a preponderance of the evidence. Permitting enforcement of Section 3583(k) so long as both findings are made would have honored Congress' directive that sex offenders like respondent receive substantial terms of reimprisonment for violating the conditions of their supervised

release, while also complying with the majority's understanding of the Fifth and Sixth Amendments.

B. The Question Presented Warrants This Court's Review

This case warrants certiorari because the decision below struck down substantial portions of a federal statute. It also introduced an irreconcilable anomaly into the otherwise uniform view of the courts of appeals that the right to a jury finding beyond a reasonable doubt does not apply to supervised-release revocation and reimprisonment.

1. The Court should grant review because the decision below invalidated multiple portions of a federal statute. App., *infra*, 28a. This Court often grants certiorari "in light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional," even in the absence of a circuit conflict. *Kebodeaux*, 570 U.S. at 391; see also, *e.g.*, *Matal* v. *Tam*, 137 S. Ct. 1744 (2017); *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076 (2015); *Department of Transp.* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225 (2015); *United States* v. *Alvarez*, 567 U.S. 709 (2012); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010); *United States* v. *Comstock*, 560 U.S. 126 (2010); *United States* v. *Stevens*, 559 U.S. 460 (2010); *United States* v. *Williams*, 553 U.S. 285 (2008). That practice is consistent with the Court's recognition that judging the constitutionality of a federal statute is "the gravest and most delicate duty that th[e] Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)).

Review is particularly appropriate here because the decision below invalidated provisions of a federal statute designed to protect the public against serious harm. Congress enacted the second and third sentences of

18 U.S.C. 3583(k) in the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. No. 109-248, § 141(e)(2), 120 Stat. 603, which it adopted "to protect the public from sex offenders and offenders against children," *id.* § 102, 120 Stat. 590. This Court has likewise recognized the "threat" of "[c]hild pornography," which "harms and debases the most defenseless of our citizens," *Williams*, 553 U.S. at 307, and the "public safety concerns" presented by the heightened rates of recidivism among sex offenders, *Kebodeaux*, 570 U.S. at 395. The Court has accordingly granted review in a number of cases in which lower courts held unconstitutional provisions of statutes designed to protect the public against those dangers, including two cases in which lower courts struck down provisions of the Adam Walsh Act itself. See *id.* at 399 (reversing court of appeals and upholding provisions of Adam Walsh Act); *Comstock*, 560 U.S. at 149-150 (same); see also *Williams*, 553 U.S. at 307 (reversing court of appeals and upholding ban on pandering or soliciting child pornography); *Smith* v. *Doe*, 538 U.S. 84, 105-106 (2003) (reversing court of appeals and upholding sex-offender registration requirement).

The statutory provisions invalidated here, moreover, are important to the system of federal supervised release. Nearly 135,000 former federal inmates are currently on supervised release, including nearly 9000 serving a term of supervised release for sex offenses. Administrative Office of the U.S. Courts, *Judicial Business 2017 Tables: Federal Probation System*, Tbls. E-2, at 1, E-3, at 1, http://www.uscourts.gov/statistics-reports/judicial-business-2017-tables. Last year, courts revoked the supervised release of more than 11,500 former federal inmates or probationers. *Id.* Tbl. E-7A. In more

than 3300 of those cases, revocation was based on the commission of major new offenses, including sex crimes. *Ibid.*

Although no statistics exist on the exact number of applications of the second and third sentences of 18 U.S.C. 3583(k), the Department of Justice's experience is that those provisions are applied with some frequency. See, *e.g.*, *United States* v. *Beyers*, 854 F.3d 1041 (8th Cir.) (affirming five-year mandatory reimprisonment under Section 3583(k) for violation of supervised-release conditions), cert. denied, 138 S. Ct. 462 (2017); *United States* v. *Terry*, 690 Fed. Appx. 358 (6th Cir. 2017) (per curiam) (same); *United States* v. *Nesler*, 659 Fed. Appx. 251 (6th Cir. 2016) (same). The provisions will likely be triggered even more frequently in the future given the large number of sex offenders on supervised release and the long terms of supervised release many are serving. See 18 U.S.C. 3583(k) (authorizing life term of supervised release); see, *e.g.*, *United States* v. *Trailer*, 827 F.3d 933, 936-938 (11th Cir. 2016) (upholding life term of supervised release imposed under Section 3583(k)); *United States* v. *James*, 792 F.3d 962, 967-969 (8th Cir. 2015) (same); *United States* v. *Helton*, 782 F.3d 148, 154-155 (4th Cir. 2015) (same).

2. Although the court of appeals' invalidation of multiple provisions of a federal statute in itself provides a sufficient basis for certiorari, the appropriateness of this Court's review is heightened here by the court of appeals' creation of an erroneous exception to a rule of law that is otherwise uniform across the circuits.

Every court of appeals to have addressed the question has concluded that the Sixth Amendment right under the Jury Trial Clause and the related due process right to factual findings beyond a reasonable doubt do

not apply to revocations of supervised release and subsequent orders of reimprisonment. See *United States* v. *Work*, 409 F.3d 484, 491-492 (1st Cir. 2005); *United States* v. *Carlton*, 442 F.3d 802, 806-810 (2d Cir. 2006); *United States* v. *Dees*, 467 F.3d 847, 854-855 (3d Cir. 2006), cert. denied, 552 U.S. 830 (2007); *United States* v. *Ward*, 770 F.3d 1090, 1096-1099 (4th Cir. 2014); *United States* v. *Hinson*, 429 F.3d 114, 117-119 (5th Cir. 2005), cert. denied, 547 U.S. 1083 (2006); *United States* v. *Johnson*, 356 Fed. Appx. 785, 790-792 (6th Cir. 2009) (Moore, J., joined by O'Connor, J., sitting by designation); *United States* v. *McIntosh*, 630 F.3d 699, 703 (7th Cir.), cert. denied, 563 U.S. 951 (2011); *United States* v. *Gavilanes-Ocaranza*, 772 F.3d 624, 628-629 (9th Cir. 2014), cert. denied, 136 S. Ct. 225 (2015); *United States* v. *Cunningham*, 607 F.3d 1264, 1266-1268 (11th Cir.), cert. denied, 562 U.S. 971 (2010); cf. *United States* v. *Owen*, 854 F.3d 536, 541 (8th Cir. 2017) (holding that the "Sixth Amendment right to counsel" does not apply in supervised-release revocation proceedings); *United States* v. *Ray*, 530 F.3d 666, 668 (8th Cir. 2008) (same with respect to Sixth Amendment Confrontation Clause); *United States* v. *House*, 501 F.3d 928, 931 (8th Cir. 2007) (same with respect to "Sixth Amendment speedy trial right").

Indeed, an earlier decision of the Tenth Circuit itself recognized that "[i]t is well-settled that supervised release is 'part of the penalty for the initial offense,' and that 'once the original sentence has been imposed in a criminal case, further proceedings with respect to that sentence have not been subject to Sixth Amendment protections.'" *United States* v. *Cordova*, 461 F.3d 1184, 1186 (2006) (brackets and citations omitted); cf. *United States* v. *Henry*, 852 F.3d 1204, 1206 (10th Cir. 2017)

(Gorsuch, J.) (stating that "the Confrontation Clause of the Sixth Amendment does not apply to supervised release revocation proceedings"). The majority below purported to follow that decision, justifying its holding on the theory that Section 3583(k) is a special exception to the general rule. See App., *infra*, 17a, 19a n.1. But as the dissenting judge observed, the majority's underlying rationale "seems" to apply to "all revocation proceedings," *id.* at 31a, and its ultimate result is in tension with other circuits' statements suggesting that the jury-trial right categorically does not apply.

The decision below is in even greater tension with the Fourth Circuit's decision in *United States* v. *Ward*, *supra*, which rejected a Sixth Amendment challenge to a since-repealed provision of 18 U.S.C. 3583(g) (1988) that required a district court to revoke a defendant's term of supervised release and order him to "serve in prison not less than one-third of th[at] term" if the court found, by a preponderance of the evidence, that the defendant possessed a controlled substance while on supervised release. 770 F.3d at 1093 (quoting 18 U.S.C. 3583(g) (1988)). The Fourth Circuit explained that "in contrast to the criminal trials at issue in *Alleyne* and *Apprendi*, supervised release revocation proceedings are not considered part of a criminal prosecution." *Id.* at 1097. And the court reasoned that "the constitutional protections afforded in a criminal trial are not co-extensive with the rights applicable in post-conviction proceedings such as supervised-release revocation hearings," in part because individuals on supervised release—like those on parole—"enjoy only 'conditional liberty' because they have already been convicted of the underlying criminal offense." *Id.* at 1097-1098. *Ward* involved a different mandatory revocation and reimprisonment

provision than the one at issue here, but the Fourth Circuit's reasoning in that decision cannot be squared with the reasoning of the decision below.

Although no court of appeals has directly rejected a preserved challenge to the constitutionality of Section 3583(k), and thus no square conflict exists, the question presented has been and continues to be raised in other circuits. See *United States* v. *Sperling*, 699 Fed. Appx. 636, 637 (9th Cir. 2017) (rejecting plain-error claim challenging Section 3583(k) on Sixth Amendment grounds), petition for cert. pending, No. 17-8390 (filed Mar. 28, 2018); see also *United States* v. *Hollman*, appeal pending, No. 18-1874 (7th Cir. filed Apr. 23, 2018) (raising question presented). The decision below will create incentives for further litigation, which will inevitably result in either a full-blown circuit conflict or more widespread and erroneous invalidation of the federal statute at issue. This Court's intervention is accordingly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-5156

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANDRE RALPH HAYMOND, DEFENDANT-APPELLANT

**APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 4:08-CR-00201-TCK-1)**

[Filed: Aug. 31, 2017]

Before: KELLY, BRISCOE, and MCHUGH, Circuit Judges.

BRISCOE, Circuit Judge.

The district court revoked Andre Ralph Haymond's supervised release based in part on a finding that Haymond knowingly possessed thirteen images of child pornography. The district court imposed the mandatory minimum sentence required by 18 U.S.C. § 3583(k). Haymond appeals and argues that the evidence was insufficient to support a finding by a preponderance of the evidence that he possessed child pornography, and that 18 U.S.C. § 3583(k) is unconstitutional because it violates his right to due process.

We conclude that the evidence was sufficient to support the district court's finding that Haymond violated

the conditions of his supervised release, but we agree that 18 U.S.C. § 3583(k) is unconstitutional because it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range, and it imposes heightened punishment on sex offenders based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt. Thus, we affirm the district court's revocation of Haymond's supervised release, but we vacate Haymond's sentence and remand for resentencing.

I

On January 21, 2010, Haymond was convicted by a jury of one count of possession and attempted possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). Aplt. App. vol. I, at 29. For this offense, Haymond was sentenced to thirty-eight months of imprisonment, to be followed by ten years of supervised release. Id. at 30-31. Haymond began serving his supervised release on April 24, 2013. Id. at 144.

On October 22, 2015, at 6:00 am, probation officers conducted a surprise search of Haymond's apartment. Id. at 145. The officers seized a password-protected Samsung cellular Android phone belonging to Haymond, a personal computer belonging to Haymond, a personal computer belonging to Haymond's roommate, and two other computers found in the kitchen area. Id.

A probation officer conducted a forensic examination of Haymond's phone using a Cellebrite device, which extracts the flash memory of the phone for ex-

amination. Id. This examination revealed web history for only October 21, 2015, indicating that all prior history had been deleted. Id. at 146. The web history for October 21 contained numerous websites with titles indicative of sexually explicit material. Id. (listing websites). The forensic examination of Haymond's phone also revealed fifty-nine images that the FBI's Internet Crime Task Force identified as child pornography. Id. at 147.

Based on these findings, Haymond's probation officer alleged that Haymond had committed five violations of his supervised release: (1) possession of fifty-nine images of child pornography, in violation of the mandatory condition that Haymond not commit another federal, state, or local crime; (2) failure to disclose to the probation office all internet devices he possessed, in violation of a special computer restriction; (3) possession of numerous sexually explicit images on his phone, in violation of a special condition that he not view or possess pornography; (4) failure to install and pay for computer monitoring software, in violation of a special monitoring condition; and (5) failure to attend sex offender treatment on fifteen occasions, in violation of a special condition that he participate in treatment. Id. at 142.

The district court found, by a preponderance of the evidence, that Haymond had committed all five violations, but, with respect to the first alleged violation, possession of child pornography, the court concluded that Haymond had possessed only the thirteen images located in his phone's gallery cache, not the other forty-six images located in other portions of the phone's cache. Id. Because the possession of child pornogra-

phy triggered a mandatory minimum sentence of five years' reincarceration, under 18 U.S.C. § 3583(k), the judge sentenced Haymond to five years' reincarceration, to be followed by a five-year term of supervised release. Id. at 191-92, Aplt. App. vol. III, at 152.

Haymond appeals and challenges only the first of these alleged violations. He argues: (1) that the presence of images in his phone cache was insufficient to show by a preponderance of the evidence that he knowingly possessed child pornography, and (2) that 18 U.S.C. § 3583(k) is unconstitutional because it deprives him of due process. Aplt. Br. at 2-4.

II

"We review the district court's decision to revoke supervised release for abuse of discretion." United States v. Jones, 818 F.3d 1091, 1097 (10th Cir. 2016) (quoting United States v. LeCompte, 800 F.3d 1209, 1215 (10th Cir. 2015)). "A district court abuses its discretion when it relies on an incorrect conclusion of law or a clearly erroneous finding of fact." United States v. Battle, 706 F.3d 1313, 1317 (10th Cir. 2013). "A finding of fact is clearly erroneous if it is without factual support in the record or if, after reviewing all of the evidence, we are left with the definite and firm conviction that a mistake has been made." United States v. Hernandez, 847 F.3d 1257, 1263 (10th Cir. 2017) (quoting In re Vaughn, 765 F.3d 1174, 1180 (10th Cir. 2014)).

Here, the district court abused its discretion by relying on a clearly erroneous finding of fact that "Haymond knowingly took some volitional act related to the Gallery Images that resulted in the images being on his phone in a manner consistent with knowing posses-

sion." Aplt. App. vol. I, at 164. Nonetheless, the remaining evidence in the record was sufficient to support a finding, by a preponderance of the evidence, that Haymond knowingly possessed the thirteen images of child pornography located in the Gallery cache of his smart phone.

The only expert testimony regarding the Gallery cache function on Haymond's smart phone came from David Penrod, who testified as an expert for Haymond; the prosecution did not provide any expert testimony. Id. at 166. With respect to all fifty-nine images, Penrod testified that the presence of the images in the phone's cache did not indicate whether or not the user had viewed the images or knew of their existence. Aplt. App. vol. II, at 128 ("With Internet cache databases, all that information is automatically downloaded in the background without the user's knowledge."); id. at 163-64 (A user may not know images in the Gallery cache exist "because the Gallery3D cache database contains images from all over the phone, not just from one particular folder on the phone."); id. at 140 ("[T]he fact [the apk file is] still sitting there in the download folder is very strong evidence that the user had no knowledge that this file was there."). Further, Penrod testified that all the images were thumbnails, indicating that the user had not clicked on them because, if the user had viewed an enlarged image, that enlarged image would also appear in the cache. Id. at 130-32. The images did not include any metadata, so it was impossible to determine when the images came to be on the phone, except to say "that they arrived in the cache file of the phone at some point prior to seizure." Aplt. App. vol. I, at 149; Aplt. App. vol. II, at 135-36.

Penrod also testified that Android smart phone users can easily access their photo gallery through the Gallery3D application and can look through the photos in that application. Aplt. App. vol. II, at 158. He was then asked this question: "So a cached file from the Gallery indicates that, just the same way as for the Samsung browser, that at one point an image that corresponded to that cached file was present in that application?" Id. at 159. He responded, "Correct." Id.

Further, Penrod's testimony makes clear that images can appear in the Gallery3D application without a user taking any volitional action to place them there. Penrod testified that "the gallery cache functions in the same way that the browser cache does: it's a cached database and it contains thumbnails." Id. at 163. He stated that the Gallery3D application searches the phone for all images on the phone. Id. ("[I]t's going to go out and look for actual images throughout the phone."). Therefore, he testified that a user might not know about all the images in the Gallery cache. Id. at 163-64.

After recounting this testimony, the district court concluded, "[b]ased on this testimony and other circumstantial evidence," that it was "more likely than not that Haymond knowingly possessed the Gallery Images at a point in time prior to search of the phone." Aplt. App. vol. I, at 163. Specifically, the court made the following findings:

- "Haymond had nearly exclusive use and possession of his password-protected phone," id. at 163-64;

- Only Haymond "possessed the phone at relevant times," id. at 164;
- "[O]nly those images actually 'on the phone' (and not images merely accessed or viewed on the phone using a browser application) would have a "gallery 3d" path when found in the cache," id. (quoting Aplt. App. vol. II, at 168);
- "[O]n the phone" means "*saved, downloaded, or otherwise* accessible on the phone in some application for viewing at the user's discretion," id. (emphasis added);
- "*Haymond knowingly took some volitional act related to the Gallery Images that resulted in the images being on his phone in a manner consistent with knowing possession,*" id. (emphasis added);
- "[T]hese 13 images previously resided in an accessible area of Haymond's phone and were under his control," id.;
- "*[T]he path demonstrates that Haymond took prior volitional actions with regard to the Gallery Images,*" id. (emphasis added);
- Unlike the Browser Images or the APK Images, "the 13 Gallery Images depict sexual acts between young boys or between boys and adult males," which is "consistent with images forming the basis of Haymond's original conviction," id. at 165.

The portions in italics are clearly erroneous because the district court expressly relied on Penrod's testimony as support, but these findings are actually contradicted by Penrod's testimony. We agree with the district court that "[s]aving, downloading, or otherwise

placing the image in an application on the phone is a similar volitional act" to the "volitional downloads from Limewire" that supported Haymond's original conviction. See id. at 164. But Penrod's testimony supports only a finding that the images were at some point accessible on Haymond's phone, not that Haymond necessarily saved, downloaded, or otherwise placed them there. Penrod's testimony cannot be construed to indicate either that Haymond knew the images were in the Gallery3D application, or that he took any volitional action to cause them to be there.

Even if this was not clear from Penrod's testimony at the hearing, Haymond submitted a letter from Penrod clarifying that, "[w]ithout additional information about them, the most one can say about the photographs linked to thumbnail images in the Gallery3D cache database is that they were on the phone at one time." Id. at 186. Penrod gave five examples of ways the images might have arrived on Haymond's phone without Haymond's knowledge or volitional acts, including as zip file attachments to emails, as text messages sent without Haymond's consent, as attachments to messages on social media sites, as part of a mass file transfer from a computer, or downloaded from the internet as part of a set. Id. According to Penrod, "[o]pening the transferred archives, folders, or sets would have launched the phone's Gallery3D service. The service would have automatically scanned the contents of the new directories, extracted thumbnail images from all the photos within them, and stored the thumbnails in the Gallery3D cache database." Id. Penrod stated unequivocally:

> The mere fact that these thumbnail images are in the Gallery3D cache database does not mean, however, that Mr. Haymond had viewed their full size counterparts or even knew of their existence. The thumbnails in the cache database also do not mean that Mr. Haymond caused the full size versions to be transferred to his phone.

Id. The district court should not have concluded the opposite from Penrod's testimony. The district court's finding that "the path demonstrates that Haymond took prior volitional actions with regard to the Gallery Images," id. at 168, was not supported by any evidence in the record, so it was clearly erroneous.

When this incorrect finding is excluded, we are left with the following:

- Haymond had nearly exclusive use and possession of his password-protected phone and only Haymond possessed the phone at relevant times;
- At some point, thirteen images of child pornography were accessible somewhere on Haymond's phone;
- The images depict sexual acts between young boys or between boys and adult males, which is consistent with images forming the basis of Haymond's original conviction.

This is a close case, even under a preponderance of the evidence standard, but we conclude this evidence is sufficient to support a conclusion that Haymond knowingly possessed the thirteen images located in the Gallery cache of his smart phone.

It is undisputed that the images were once accessible on Haymond's smart phone; the only debate is

whether he knew the images were there. We must then decide whether it is "more likely than not" that Haymond knew about the images. From Penrod's testimony, the images could have come to be in the phone's Gallery3D application via an automatic process related to, for example, a zip file or mass file transfer, but Penrod also could not rule out the possibility that Haymond saved the images to the Gallery3D application on his phone. Although it is ***possible*** that the images of child pornography were downloaded into Haymond's smart phone's Gallery cache through an automatic process of which he was unaware, we conclude it is ***more likely than not*** that Haymond did in fact download and save the images. Such a volitional act would constitute knowing possession. Thus, the evidence in the record is sufficient to support a finding, by a preponderance of the evidence, that Haymond knowingly possessed child pornography, in violation of the conditions of his supervised release.

III

Because we conclude that the evidence was sufficient to support Haymond's violation for possession of child pornography, we are left with the constitutional question presented. On that issue, we conclude that § 3583(k) is unconstitutional because it changes the mandatory sentencing range to which a defendant may be subjected, based on facts found by a judge, not by a jury, and because it punishes defendants for subsequent conduct rather than for the original crime of conviction.

"We review the constitutionality of a statute de novo." United States v. Berres, 777 F.3d 1083, 1087 (10th Cir. 2015). But we may "invalidate a congres-

sional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." United States v. Morrison, 529 U.S. 598, 607 (2000); United States v. White, 782 F.3d 1118, 1123 (10th Cir. 2015) (quoting Morrison). It is plain here on the face of the statute that Congress has done just that.

Imposition of supervised release is governed by 18 U.S.C. § 3583. The court, when imposing a sentence following a felony or misdemeanor conviction, may include a term of supervised release "as a part of the sentence." 18 U.S.C. § 3583(a). The statute ties the applicable length of supervised release to the crime of conviction; it provides for up to five years of supervised release for a Class A or Class B felony, up to three years for a Class C or Class D felony, and up to one year for a Class E felony, or for a misdemeanor (other than a petty offense). Id. § 3583(b). For certain specific crimes, including Haymond's original crime of conviction, a separate subsection authorizes a term of supervised release of at least five years and up to life. Id. § 3583(k). In all cases, the term of supervised release authorized is dependent on the severity of the defendant's original crime of conviction.

The court may impose conditions on the defendant during the term of supervised release, and must impose certain mandatory conditions, including the condition "that the defendant not commit another Federal, State, or local crime during the term of supervision." Id. § 3583(d).

The court may modify or revoke the term or conditions of supervised release. Id. § 3583(e). Most revocations are governed by § 3583(e)(3), which provides that the court, if it "finds by a preponderance of the

evidence that the defendant violated a condition of supervised release," may

> revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision . . . except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case.

Id. § 3583(e)(3). Again, the maximum terms of reimprisonment authorized by the statute for violations of the conditions of supervised release are limited based on the severity of the defendant's original crime of conviction, not the conduct that resulted in the revocation. Id.; United States v. Collins, 859 F.3d 1207, 1218 (10th Cir. 2017).

The United States Sentencing Commission must promulgate and distribute "guidelines or general policy statements regarding . . . the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18." 28 U.S.C. § 994(a)(3). Accordingly, the Commission has issued policy statements regarding the revocation of supervised release. According to the Sentencing Guidelines Manual, "at revocation the court should sanction primarily the defendant's

breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator." U.S. Sentencing Guidelines Manual Ch. 7, Pt. A, introductory cmt. (3)(b) (U.S. Sentencing Comm's 2016). "The revocation policy statements categorize violations of probation and supervised release in three broad classifications ranging from serious new felonious criminal conduct to less serious criminal conduct and technical violations." Id. Ch. 7, Pt. A, introductory cmt. 4; id. § 7B1.1(a). "The grade of the violation, together with the violator's criminal history category calculated at the time of the initial sentencing, fix the applicable sentencing range." Id. Ch. 7 Pt. A, introductory cmt. 4; id. §§ 7B1.3; 7B1.4. The recommended terms of reimprisonment following revocation of supervised release range from three months to sixty-three months. Id. § 7B1.4(a). In all cases, the recommended term of reimprisonment must be within the statutorily authorized range. Id. § 7B1.4(b).

The court may impose an additional term of supervised release to follow the term of reimprisonment. Id. § 3583(h). The length of a subsequent term of supervised release "shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release." Id. Thus, with regard to any subsequent terms of supervised release, the maximum length of those terms is also based upon the original crime of conviction, not the new conduct.

A special provision, the one challenged here, then provides:

> Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

Id. § 3583(k).

Haymond's original crime of conviction, one count of possession and attempted possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B), is a Class C felony. 18 U.S.C. § 3359(a)(3). The statutory penalty for violation of 18 U.S.C. § 2252(a)(4)(B) is a fine or imprisonment up to ten years, or both. Id. § 2252(b)(2). The supervised release statute also requires a mandatory term of supervised release of five years to life. Id. § 3583(k). If a court later finds the defendant has violated the conditions of that supervised release it might revoke the term of supervised release and impose a term of reimprisonment. Id. § 3583(e)(3), (k). Most violations fall under § 3583(e)(3), which, based on Haymond's original conviction for a Class C felony, authorizes a subsequent term of imprisonment of no more than two years. Id. A violation that is

the commission of "any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed," however, is governed instead by § 3583(k), which, when read with § 3583(e)(3), requires a mandatory term of reimprisonment of at least five years and up to life. Id. § 3583(e)(3), (k).

If not for the mandatory minimum sentence required by § 3583(k), the sentence Haymond received following revocation of his supervised release would have been significantly lower—two years at most. Id. § 3583(e)(3). The sentencing judge stated on the record that, "were there not this statutory minimum, the court would have looked at this as a grade B violation and probably would have sentenced in the range of two years or less." Aplt. App. vol. III, at 152.

We conclude that 18 U.S.C. § 3583(k) violates the Fifth and Sixth Amendments because (1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range, and (2) it imposes heightened punishment on sex offenders expressly based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt and for which they may be separately charged, convicted, and punished.

First, 18 U.S.C. § 3583(k) is unconstitutional because it increases the mandatory minimum penalty to which a defendant may be subjected, and does so based on facts not found by the jury. According to the Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Alleyne v. United States, __ U.S. __, 133 S. Ct. 2151 (2013), "[a]ny fact that, by law,

increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Alleyne, 133 S. Ct. at 2155. This includes any fact that increases either the mandatory minimum or the statutory maximum. Id.

But "[e]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." Id. at 2163 (quoting Apprendi, 530 U.S. at 519). "We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." United States v. Booker, 543 U.S. 220, 233 (2005). "[W]hen a trial judge exercises his [or her] discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." Id. In this context, discretion is key; the Supreme Court held in United States v. Booker, 543 U.S. 220 (2005), that the Sentencing Guidelines must be advisory, not mandatory, in order to avoid violating the Sixth Amendment right to a trial by jury. Id. at 245-46.

In other words, the facts which determine the mandatory sentencing range must be decided by a jury. Alleyne, 133 S. Ct. at 2155. The judge may make factual findings that will impact the sentence imposed within that range, but the judge must retain discretion as to the sentence that will be imposed based on those facts. Booker, 543 U.S. at 233.

The government argues that, because Alleyne and Apprendi do not apply to revocation proceedings, Booker also does not apply. Aple. Br. at 20-26. We disagree because Alleyne and Apprendi apply to crim-

inal prosecutions, but Booker applies to sentencing. "Criminal proceedings generally unfold in three discrete phases": investigation, criminal prosecution, and sentencing. Betterman v. Montana, __ U.S. __, 136 S. Ct. 1609, 1613, (2016). The due process protections afforded to defendants vary with each phase. Cf. id. at 1613-18 (describing the protections against delay at each phase).

Apprendi and Alleyne apply to the second phase, the criminal prosecution. They establish the protection that each element of the crime be submitted to the jury and proved beyond a reasonable doubt. Revocation of supervised release is not part of a criminal prosecution, so defendants accused of a violation of the conditions of supervised release have no right to a jury determination of the facts constituting that violation. See Morrissey v. Brewer, 408 U.S. 471, 480 (1972) ("[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."); United States v. Cordova, 461 F.3d 1184, 1186-88 (10th Cir. 2006) (citing Morrissey and explaining "why jury trial rights do not attach to revocation proceedings").

Booker, on the other hand, applies to the third phase, sentencing. During sentencing, unlike in a criminal prosecution, the judge may find additional facts and use those facts to impose any sentence within the statutory range; the defendant has no right to a jury trial on these additional facts. Booker, 543 U.S. at 233 ("[W]hen a trial judge exercises his [or her] discretion to select a specific sentence within a defined range, the defendant has no right to a jury determina-

tion of the facts that the judge deems relevant.") However, Booker requires that the sentencing judge maintain discretion and, consequently, that the Sentencing Guidelines be viewed as advisory, not mandatory. Id. at 245.

Supervised release, including the term, conditions, revocation, and modification, is part of the sentence for the defendant's original crime of conviction. 18 U.S.C. § 3583(a) (referring to supervised release as "a part of the sentence"); id. § 3585(c), (d)(1), (d)(2), (e) (instructing courts, when imposing a term of supervised release, setting the conditions of supervised release, and terminating, extending, or revoking supervised release, to consider the § 3553(a) factors, which are "[f]actors to be considered in imposing a sentence," 18 U.S.C. § 3553(a)); Johnson v. United States, 529 U.S. 694, 700 (2000) (requiring courts to "[t]reat[] postrevocation sanctions as part of the penalty for the initial offense" in order to avoid "serious constitutional questions"); Collins, 859 F.3d at 1218 n.8 (referring to "the appropriate sentence following a violation of supervised release conditions" (emphasis added)); United States v. Lonjose, 663 F.3d 1292, 1297 n.3 (10th Cir. 2011) ("[C]onditions of supervised release are part of the Defendant's sentence."). Further, the United States Sentencing Guidelines, which were the subject of Booker, include policy statements regarding revocation of supervised release. 28 U.S.C. § 994(a)(3) (instructing the United States Sentencing Commission to promulgate and distribute "guidelines or general policy statements regarding . . . the provisions for modification of the term or conditions of supervised release and revocation of supervised release"); U.S. Sentencing Guidelines Manual Ch. 7 (setting forth policy statements

regarding violations of supervised release). Booker's requirement that the sentencing judge retain discretion applies to all sentencing proceedings, including the imposition of a subsequent term of imprisonment following revocation of supervised release.[1]

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[1] To the extent anyone argues that defendants serving terms of supervised release have no Sixth Amendment rights at all, and thus cannot benefit from the Court's decision in Booker, this assertion is stated too broadly.

It is true that, by its text, the procedures required by the Sixth Amendment apply only in "criminal prosecutions." U.S. Const. Amend. VI ("In all criminal prosecutions . . . "). Revocation is a part of the sentencing, not a part of the criminal prosecution, so the Sixth Amendment's protections cannot be directly invoked. Cordova, 461 F.3d at 1186 (quoting United States v. Work, 409 F.3d 484, 491 (1st Cir. 2005), for the proposition that "once the original sentence has been imposed in a criminal case, further proceedings with respect to that sentence [have not been] subject to Sixth Amendment protections"); Jones, 818 F.3d at 1102 ("The parties agree our case law holds that the Sixth Amendment does not apply to revocation hearings."); Curtis v. Chester, 626 F.3d 540, 544 (10th Cir. 2010) ("Sixth Amendment rights are not applicable in parole revocation hearings because those hearings are not 'criminal prosecutions.'"). Instead, general principles of due process govern the procedures that must be afforded a defendant in a revocation proceeding. Morrissey, 408 U.S. at 482 (holding "that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others" and going on to discuss what process is due).

But holding that the Sixth Amendment does not require particular procedures in a revocation hearing is not the same as holding that a defendant, once convicted of any crime, loses all Sixth Amendment rights during the term of imprisonment and supervised release. To the contrary, we know that these defendants retain the right to be free from new criminal prosecutions that would violate the Fifth and Sixth Amendments. Johnson, 529 U.S.

With that framework in mind, we turn to the statutory provision at issue here. By requiring a mandatory term of reimprisonment, 18 U.S.C. § 3583(k) increases the minimum sentence to which a defendant may be subjected. For example, when Haymond was originally convicted by a jury, the sentencing judge was authorized to impose a term of imprisonment between zero and ten years. See 18 U.S.C. § 2252(b)(2). After the judge found, by a preponderance of the evidence, however, that Haymond had violated a particular condition of his supervised release, the mandatory provision in § 3583(k) required that Haymond be sentenced to a term of reincarceration of at least five years, up to a maximum term of life. This unques-

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at 700 (noting the concern that imposing a subsequent term of imprisonment for a violation of the condition of supervised release would violate the defendant's right to a trial by jury, which is guaranteed by the Sixth Amendment, and right to be free from double jeopardy, which is guaranteed by the Fifth Amendment); Collins, 859 F.3d at 1216-17 (quoting Johnson and holding that the Fifth and Sixth Amendment rights of defendants on supervised release require us to interpret § 3583(e)(3) as setting penalties based on the original crime of conviction, not on the conduct which constituted the violation of the conditions of supervised release).

Booker itself relied on the Sixth Amendment in holding that a judge, during sentencing, must retain discretion. Booker, 543 U.S. at 244. "It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance." Id. at 237. Put another way, any proceeding that increases the authorized range of punishment to which a defendant may be subjected is, in substance, a criminal prosecution to which the protections of the Sixth Amendment apply in full. See id. at 231 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." (quoting Ring v. Arizona, 536 U.S. 584, 602 (2002)).

tionably increased the mandatory minimum[2] sentence of incarceration to which he was exposed from no years to five years, yet the jury did not make the factual finding required to change his statutorily prescribed sentencing range. Instead, that finding was made by a judge by only a preponderance of the evidence. This violates the Sixth Amendment. Booker, 543 U.S. at 244.

Second, 18 U.S.C. § 3583(k) is unconstitutional because it circumvents the protections of the Fifth and Sixth Amendments by expressly imposing an increased punishment for specific subsequent conduct. In Johnson v. United States, 529 U.S. 694 (2000), the Supreme Court made clear that, in order to avoid serious constitutional concerns, revocation of supervised release must be viewed as punishment for the original crime of conviction, not as punishment for the violation of the conditions of supervised release. Johnson, 529 U.S. at 699-700; id. at 700 (noting "the serious constitutional questions that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release."); id. at 701 ("[P]ostrevocation penalties relate to the original offense."); Cordova, 461 F.3d at 1186 ("It is well-settled that supervised release is 'part of the penalty for the initial offense.'" (quoting Johnson, 529 U.S. at 700)). Specifically, these concerns include the fact that "the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evi-

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[2] It is enough for our purposes that the mandatory minimum is increased. Thus, we need not address whether this provision also increased the statutory maximum sentence to which Haymond was exposed.

dence standard, not by a jury beyond a reasonable doubt." Johnson, 529 U.S. at 700 (citing 18 U.S.C. § 3583(e)(3)). Further, "[w]here the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense." Id. "Treating postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties." Id. (collecting cases). "We therefore attribute postrevocation penalties to the original conviction." Id.

Contrary to this requirement, § 3583(k) impermissibly requires a term of imprisonment based not on the original crime for which the defendant was properly convicted, but instead on the commission of a new offense—namely "any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed." 18 U.S.C. § 3583(k). By its plain text, § 3583(k) states that, if a qualifying defendant commits one of these enumerated crimes, "the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment . . . not less than 5 years." Id.

If Haymond were to violate the terms of his supervised release by committing any crime not enumerated in § 3583(k) or by committing a technical violation, he would be subject to revocation under § 3583(e)(3). If sentenced under § 3583(e)(3), he would face a term of reimprisonment properly limited by his original crime of conviction, with an absolute *maximum* term of two years. The district court could have sentenced Hay-

mond to life imprisonment *only* if it found that Haymond had violated the conditions of his supervised release by committing one of the subsequent crimes enumerated in § 3583(k), in which case it would have no choice but to impose a *mandatory minimum* term of five years up to life. The available punishment is tied directly to the nature of the new conduct that serves as the basis for the revocation.

Regardless of the nature or severity of the defendant's original crime of conviction, § 3583(k) imposes a mandatory minimum five-year term of imprisonment for only those specific offenses enumerated, while all other violations are subject to the maximum terms set in § 3583(e)(3). By separating these crimes from other violations, § 3583(k) imposes a heightened penalty that must be viewed, at least in part, as punishment for the subsequent conduct—conduct for which the defendant has not been tried by a jury or found guilty beyond a reasonable doubt. This, the Court has said, is not permitted. See Johnson, 529 U.S. at 699-701.

To be sure, the sentencing judge can and, according to the Sentencing Guidelines, should consider the severity of the conduct by which a defendant violated the conditions of his or her supervised release. A more serious violation might well recommend a longer term of reimprisonment. But, if we wish to maintain the premise that revocation of supervised release is a punishment for the original crime of conviction, Congress must set the authorized term of reimprisonment based on the severity of that original crime. In fact, our recent opinion in United States v. Collins, 859 F.3d 1207 (10th Cir. 2017), is dispositive on this point. In Collins, we cited Johnson and held that 18 U.S.C.

§ 3583(e)(3) sets the maximum terms of reimprisonment following revocation of supervised release based on the severity of the *original crime of conviction*, not based on the conduct that constituted the violation, because setting the punishment based on the new conduct would violate the Fifth and Sixth Amendments. Collins, 859 F.3d at 1217 ("[C]onstru[ing] the 'offense that resulted in' language of § 3583(e)(3) as referring to the violative conduct resulting in revocation . . . places us squarely at odds with the Fifth and Sixth Amendments. Our interpretation of § 3583(e)(3)—that the 'offense that resulted in' language is meant to refer to the offense for which the defendant was first sentenced to supervised release—avoids these same constitutional difficulties."). But that violation of the Fifth and Sixth Amendments—setting new punishment that is more severe than would otherwise be allowed by statute because of the severity of new conduct—is exactly what § 3583(k) purports to do.

As written, § 3583(k) expressly increases the available penalty for *only* these particular violations, so it is not based on the original crime of conviction, but on the nature of the subsequent violative conduct. This construction, like the mandatory language discussed above, effectively transforms the revocation proceeding into a criminal prosecution, imposing punishment for new conduct. "It has been settled throughout our history that the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" See Booker, 543 U.S. at 230 (quoting In re Winship, 397 U.S. 358, 364 (1970)). "It is equally clear that the 'Constitution gives a criminal defendant the right to demand that a

jury find him guilty of all the elements of the crime with which he is charged.'" Id. (quoting United States v. Gaudin, 515 U.S. 506, 511 (1995)). Thus, § 3583(k) violates the Sixth Amendment because it punishes the defendant with reincarceration for conduct of which he or she has not been found guilty by a jury beyond a reasonable doubt, and it raises the possibility that a defendant would be charged and punished twice for the same conduct, in violation of the Fifth Amendment.[3] See Johnson, 529 U.S. at 700.

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[3] Haymond also argues that his sentence violates the statutory maximum. Aplt. Br. at 27. Most interestingly, he means not the statutory maximum authorized under the supervised release statute for his original crime of conviction, but the statutory maximum set by statute for his alleged new offense, possession of child pornography. See id. 46-47. The fact that Haymond attempts to invoke the statutory maximum allowable for his alleged new crime highlights the fact that the term of incarceration imposed under § 3583(k) is most obviously viewed as a punishment, not for the original crime, but for the defendant's new conduct. As discussed, such an approach to revocation of supervised release is not permissible. Johnson, 529 U.S. at 700.

Haymond's argument on this point is otherwise unavailing. The statutory maximum sentence allowed for a particular subsequent crime has no bearing on the length of the term of reimprisonment allowed for a violation of supervised release. This is because, as discussed, "postrevocation penalties relate to the original offense," not the new conduct. Johnson, 529 U.S. at 701. And the violative conduct need not be criminal at all. Id. at 700. Conduct which is not criminal carries no permissible term of imprisonment, yet, if that conduct violates the conditions of a defendant's supervised release, it may be the basis for a term of reimprisonment following revocation of supervised release. See id.; 18 U.S.C. § 3583(e)(3). Thus, the statutory maximum sentence to which Haymond might be subjected if he were convicted of possessing child pornography is completely irrelevant to the term of reimprison-

IV

As for the appropriate remedy, "we must 'refrain from invalidating more of the statute than is necessary.'" Booker, 543 U.S. at 258 (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion)). "[W]e must retain those portions of the Act that are (1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objectives in enacting the statute." Id. at 258-59 (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)). "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." Regan, 468 U.S. at 653. "[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." Alaska Airlines, Inc., 480 U.S. at 685.

The first sentence of § 3583(k) provides:

> Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life.

Id. This sentence merely sets forth the applicable term of supervised release available based on the original crime of conviction, so it creates none of the concerns raised in this appeal regarding the imposition of

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ment that may be imposed upon him for a violation of the conditions of his supervised release.

a mandatory minimum sentence as a result of certain subsequent conduct. The next two sentences, however, provide:

> If a defendant required to register under the Sex Offender Registration and Notification Act *commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed*, the court *shall* revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. *Such term shall be not less than 5 years.*

18 U.S.C. § 3583(k) (emphasis added). The italicized language violates the Constitution by increasing the term of imprisonment authorized by statute based on facts found by a judge, not by a jury beyond a reasonable doubt, and by tying the available punishment to subsequent conduct, rather than the original crime of conviction. Thus, we must decide whether the statute can function independently without these two sentences.

We conclude that the remaining provisions of § 3583, and of the sentencing code, 18 U.S.C. §§ 3551-3586, can function independently, without the isolated provision of § 3583(k) that provides for a mandatory sentence of five years' reimprisonment to be imposed when supervised release is revoked based on commission of a specific set of subsequent crimes. Aside from three references to § 3583 generally, no other provision of the sentencing code refers to § 3583(k). Without this unconstitutional provision, all violations of the conditions of supervised release would be governed by § 3583(e)(3),

which appropriately ties the available punishments for revocation of supervised release to the original crime of conviction. Thus, the invalidation of this isolated unconstitutional provision would have no significant effect upon the sentencing code as a whole. In fact, Congress did originally enact this legislation without the challenged provision, which was only added in 2006.[4] Thus, we cannot conclude that Congress would have been unwilling to enact the legislation without this unconstitutional provision. The last two sentences of § 3583(k) are unconstitutional and unenforceable.

V

For the foregoing reasons, we AFFIRM the revocation of Haymond's supervised release, we VACATE his sentence following that revocation, and we REMAND for resentencing under § 3583(e)(3) without consideration of § 3583(k)'s mandatory minimum sentence provision or its increased penalties for certain subsequent conduct.

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[4] Congress added subsection (k) to § 3583 in 2003 and extended the authorized term of supervised release for sex offenders to "any term of years or life." See PROTECT Act of 2003, Pub. L. No. 108-21, § 101, 117 Stat. 650, 651-52 (2003). A 2006 amendment added the minimum five year term of imprisonment following revocation for certain subsequent crimes and provided that the ordinary term limits in subsection (e)(3) did not apply. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 141(e)(2), 120 Stat. 587, 603 (2006).

No. 16-5156, United States v. Andre Ralph Haymond

KELLY, Circuit Judge, concurring in part and dissenting in part.

I concur that the government met its burden of showing by a preponderance of the evidence that Mr. Haymond knowingly possessed child pornography. I disagree with the court that some of the district court's factual findings supporting this conclusion are clearly erroneous. I also dissent from the court's holding that 18 U.S.C. § 3583(k) is unconstitutional.

Our review of factual findings is "significantly deferential." Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 623 (1993).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985).

When looking at the record as a whole, the district court's view of the evidence was permissible. For instance, this court holds that it is clearly erroneous that "on the phone" means "saved, downloaded, or otherwise accessible on the phone in some application for viewing at the user's discretion." Ct. Op. at 7 (brackets, emphasis, and citation omitted). But the district court's interpretation is supported by Mr. Penrod's

testimony that the Gallery3D application searches the phone for existing images—and that, unlike with images stored in the browser cache, there was no alternative explanation (i.e., other than that the images were already on the phone) for how the images were stored in the cache. 2 R. 167-68. Mr. Penrod's later clarification of the different ways the images could have been saved or downloaded to the phone—via text message, social media, email, etc.—does not make the statement any less true, or any less supported by the evidence.

Likewise, the court holds that it is clearly erroneous that "Haymond knowingly took some volitional act related to the Gallery Images that resulted in the images being on his phone in a manner consistent with knowing possession" and that "the path demonstrates that Haymond took prior volitional actions with regard to the Gallery Images." Ct. Op. at 7 (brackets, emphasis, and citation omitted). These district court findings are ostensibly error based on Mr. Penrod's clarification that, because there was no metadata associated with the images, one could not say with certainty how the images came to be on the phone. Id. at 7-8; see 1 R. 186. But these findings are not clearly erroneous merely because the technological path could not clarify with 100% accuracy how the images got on the phone. The district court reasonably concluded that the most likely explanation was that Mr. Haymond did something to allow them to be there. Indeed, the factual findings that this court agrees were proper seem to support this conclusion: Mr. Haymond had exclusive use of his phone, the images were on the phone, the images were accessible to Mr. Haymond, and the images were similar to those he was previously convicted of illegally possessing. Viewed in light of the surround-

ing evidence, simply because there are two views of Mr. Penrod's testimony does not mean that the district court clearly erred in choosing one over the other.

As for the constitutionality of 18 U.S.C. § 3583(k), I disagree with the court's conclusion that United States v. Booker, 543 U.S. 220 (2005), applies to revocation proceedings. Ct. Op. at 15-16. Mr. Haymond was tried and found guilty beyond a reasonable doubt of the original offense, and those jury-found facts supported the sentence imposed. Booker applied to that sentence. Mr. Haymond also was instructed that supervised release would be part of that sentence and that there were certain restrictions he had to abide by lest his supervised release be revoked.

As the Supreme Court has explained, revocation of supervised release "need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt." Johnson v. United States, 529 U.S. 694, 700 (2000). That the full panoply of rights were guaranteed to Mr. Haymond during his initial criminal proceeding does not mean that they attach once more during a revocation proceeding. That proceeding is, after all, "not a stage of a criminal prosecution." Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

Up to this point, the court and I agree. We disagree that § 3583(k) becomes unconstitutional because it "increases the mandatory minimum penalty to which a defendant may be subjected, and does so based on facts not found by the jury." Ct. Op. at 14. Were the court correct, the problem it identifies seems like it would be true of all revocation proceedings: if a defendant is sentenced to any term of supervised release,

the fact that the release can then be revoked and the defendant be sent back to prison for an *additional* term means that "the penalty to which a defendant *may be subjected*" has been increased based on facts not found by a jury. Id. (emphasis added).

In other words, unless either (a) all revocation proceedings must empanel juries for fact-finding (which the Supreme Court, with good reason, has told us is not the case) or (b) the revocation proceeding is treated as a new criminal prosecution (which the Supreme Court also has told us is not the case), it is hard to understand why under current precedent Booker would apply but Apprendi and Alleyne would not. While postrevocation penalties might be considered attributable to the original conviction, the revocation proceeding is neither part of that criminal prosecution nor is it a new criminal prosecution. See Johnson, 529 U.S. at 700.

The Supreme Court has also answered the court's second objection to § 3583(k)—that it "circumvents the protections of the Fifth and Sixth Amendments by expressly imposing an increased punishment for specific conduct." Ct. Op. at 20. The court cites Johnson for the proposition that revocation of supervised release is not "punishment for the violation of the conditions of supervised release," id. (citing 529 U.S. at 699-700), but then fails to take the Supreme Court at its word. This is apparently because Congress has delineated different terms of revocation for different breaches of supervised release. Id. at 21 (comparing § 3583(k), which ties its requirement of at least five years' revocation to the commission of enumerated sex offenses, with § 3583(e)(3), which sets limits on the resulting terms of reimprisonment based on the "offense that resulted" in

the underlying supervised release). The court takes issue with the fact that had Mr. Haymond violated the conditions of his supervised release in a manner other than by committing one of the crimes referenced in § 3583(k), then he would have been subject to revocation under § 3583(e)(3) and faced a shorter term of reimprisonment. Ct. Op. at 21. Therefore, the court concludes, subsection (k) is actually punishment for the new crime.

But the distinction cannot be (and I do not take the court to contend) that revocation based on the commission of a new crime is punishment for the new crime, because § 3583(d) explicitly requires the sentencing court to include "as an explicit condition of supervised release, that the defendant not commit another . . . crime during the term of supervision." If a defendant on supervised release did so, then his release could be revoked under § 3583(e)(3). The court rightly does not contend that this would be a new "punishment."

Instead, the distinction, apparently, is that the terms of revocation differ based on what kind of new crime the defendant committed. But I see no reason why Congress cannot make that distinction. As the Sentencing Guidelines explain, under the "breach of trust" theory applicable to the revocation of supervised release, "the nature of the conduct leading to the revocation [can] be considered in measuring the extent of the breach of trust." U.S. Sentencing Guidelines Manual § 7A3(b) (2016). In my view, Congress can determine that the commission of certain crimes constitutes a more serious breach of trust warranting a longer term of revocation. Doing so does not thereby make the revocation proceeding a new criminal prose-

cution, nor would it be inconsistent with our holding in United States v. Collins, 859 F.3d 1207, 1210 (10th Cir. 2017), to conclude that the language in § 3583(e)(3)—"the offense that resulted in the term of supervised release"—refers to the original crime. Cf. Ct. Op. at 22.

Ultimately, we should not jump ahead of the Supreme Court when it has already spoken on this issue. Any tension between the supervised release scheme approved in Johnson and the rationale of the Apprendi/Booker line of cases is for the Supreme Court itself to resolve. See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989). Therefore, I would affirm the revocation of supervised release and the resulting sentence.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 08-CR-201-TCK

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANDRE RALPH HAYMOND, DEFENDANT

OPINION AND ORDER

Filed: Aug. 2, 2016

Before the Court is the Order on Supervised Release (Doc. 183) ("OSR"), which alleges five violations of Defendant Andre Ralph Haymond's ("Haymond") conditions of supervised release: (I) violation of Mandatory Condition not to commit another federal, state or local crime—namely, possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) ("Violation I"); (II) violation of Special Computer Restriction Condition (2) requiring Haymond to disclose to the probation office all internet connection devices he possesses ("Violation II"); (III) violation of Special Condition 3(4) prohibiting Haymond from viewing or possessing any images depicting sexually explicit conduct or child pornography ("Violation III"); (IV) violation of Special Condition 3(2) authorizing the probation office to monitor all computer activity and to install remote monitoring software on all internet connections at Hay-

mond's expense ("Violation IV"); and (V) violation of Special Condition 1(1) requiring Haymond to attend sex offender treatment ("Violation V").[1]

On June 21, 2016, the Court conducted an evidentiary hearing on the OSR, during which Haymond contested the factual basis for all five violations. Haymond was represented by William Lunn ("Lunn"), the same lawyer who represented him during his original trial and appeal. The United States presented two United States Probation Officers for the Northern District of Oklahoma as witnesses—Sharla Belluomo ("Belluomo") and Kory McClintock ("McClintock"). Lunn presented three witnesses—forensic expert David Penrod ("Penrod"),[2] Haymond's roommate Myra Entizne ("Myra"), and Haymond.

It is unusual for this Court to write an Opinion and Order following a revocation proceeding. However, Violation I presents complex issues and carries a mandatory minimum five-year sentence due to application of 18 U.S.C. § 3583(k). Therefore, although Violation I is being prosecuted in the form of a revocation, it has serious ramifications for Haymond, and the Court issues the following explanation of its revocation decision.

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[1] In the OSR, there appear to be four violations due to misnumbering, but there are actually five alleged violations.

[2] Penrod was also involved in Haymond's original trial and appeal. The Court granted funds for Penrod to travel to Tulsa and conduct his forensic examination. Penrod testified via video conference during the hearing.

I. Factual Findings

A. Background

In 2007, when Haymond was 18 years of age, an undercover FBI agent caught Haymond sharing child pornography files on Limewire, a peer-to-peer sharing network. The FBI located Haymond's computer, obtained a search warrant for his grandmother's house where he resided, and seized his computer. Using a specialized software program known as Forensic Toolkit, the FBI located seventy files containing child pornography, from which they selected seven images to prosecute. These images were all of minor boys engaged in sexual activity and were part of a "Brad and Bry" series of photos known to have originated in Florida. These seven images had been deleted from Haymond's computer, lacked metadata, and were found only in the computer's "unallocated space." After his arrest, Haymond admitted during interrogation that: (1) he was addicted to child pornography; (2) he had been accessing child pornography since 2006 using peer-to-peer file sharing programs such as Limewire; (3) he searched the Internet regularly for child pornography; (4) he deleted the images after he viewed them by reformatting his hard drive and reinstalling his Windows operating system; and (5) he was studying computer programming and video game and web design at a community college. Based on this evidence, a jury convicted Haymond of possession and attempted possession of seven images found in the unallocated space. The Court sentenced Haymond to 38 months imprisonment and 10 years supervised release, and imposed numerous conditions of release including computer monitoring.

After release from prison, Haymond commenced his term of supervised release on April 24, 2013. On April 8, 2014, Haymond was indicted in a separate case for Failure to Register as a Sex Offender. In June of 2014, he entered into an 18-month deferred prosecution agreement on that charge. While on supervised release, Haymond maintained employment. He passed several polygraph examinations inquiring whether he viewed or accessed child pornography, including one as recent as one month prior to the search and seizure leading to the current revocation. Haymond sometimes attended sex offender treatment but missed his treatment appointments on numerous occasions.

Haymond's main problems while on supervised release related to compliance with his computer monitoring conditions. Beginning January 5, 2015, Belluomo began supervising Haymond. Belluomo testified that, from January to October of 2015, Haymond uninstalled monitoring software from his personal computer, did not stay current on his monitoring software payments, and failed to keep installation appointments with the software company. After Haymond repeatedly failed to comply with Belluomo's directives regarding the monitoring software, Belluomo grew concerned because she could not monitor Haymond's activity on his personal computer. She gave him a strict deadline for compliance with these directives, which he did not meet. On one occasion, Haymond bragged to Belluomo that he could outsmart the monitoring software.

Based on these and other concerns, Belluomo organized a search team. On October 22, 2015, at 6:00 a.m., probation officers conducted a search of Haymond's apartment. In order to prevent deletion of

illegal activity, the officers did not warn Haymond they were coming. During the search, officers seized (1) a password-protected Samsung cellular android phone belonging to Haymond ("phone"), (2) a personal computer belonging to Haymond, (3) a personal computer belonging to Haymond's roommate Myra, and (4) two other computers found in the kitchen area. Haymond had informed Belluomo of the phone and two personal computers used by himself and Myra but had not informed her of the two computers found in the kitchen area. The computers found in the kitchen were not being monitored. Although Haymond denied that these two computers were operational, he did not deny ownership of them. The phone was also not being monitored, but that had not been required by the probation office.

B. Search of Phone

1. Web History for October 21, 2015

McClintock conducted a forensic search of Haymond's phone using a Cellebrite device. Cellebrite is a mobile forensic company that provides software and devices to perform forensic examinations of mobile phones and tablets. The Cellebrite device extracts the flash memory of the phone for examination.

McClintock was only able to locate Haymond's "web history" for the day immediately preceding the surprise search, October 21, 2015. Haymond's web history for just one day indicates that he frequently uses his phone's computer to access the internet. The Court finds that Haymond daily (or at least regularly) deleted his web history but, due to the surprise search, did not have a chance to do so for October 21, 2015.

The United States did not ask Haymond if, when, how, or why he cleared the web history from his phone. However, the Court takes judicial notice that clearing one's web history from a cellular phone is not a difficult task and can be a sound security practice. Therefore, while it may be relevant to avoiding detection of criminal activity, this type of deletion does not carry the same significance as wiping one's hard drive with special software and reinstalling an operating system.

On October 21, 2015, Haymond did not enter any searches for child pornography. He did enter a search for "open relationships," which the Court does not find to be a search for illicit images. Nonetheless, excluding all entries labeled "cookies" and including only those entries labeled "web history," Defendant's Exhibit 10 reveals the following relevant web history beginning at 10:09:26 PM (UTC) and ending at 10:33:39 PM (UTC):

> Love TGP[3]
> Young Lesbians Portal [followed by: alexa004.jpg, alexa010.jpg]
> Nasty Angels—Most Charming Young Girls [followed by p02.jpg; p07.jpg; p08.jpg]
> Naked Teen Porn @ My Sexy Teens
> My Sexy Teens—Teen Pics
> 18Magazine.com—18 Magazine—Hot Teen Models Amateur & Pro
> Porn Girls Sex—Naked Girls Models, Sex Russian Style [followed by 77087.jpg]

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[3] The Court finds, based on other descriptions in the web history, that TGP likely stands for teen girl porn or teen girl pussy.

Naked Teens Live—Teen Nude Girl, Pictures Nude Teens [followed by 29220.jpg; 29231.jpg]
Teen Girls Pussy
Teen Big Cock Pics
Pure 18 Mobile Porn—Hot Verified 18 Years Old Teens
Best 18 Teens—Teens Porn & Young Sex
Teens Kitten—Teens Porn & Young Sex
Hot Girls 4 All—free xxx galleries of sexy girls, teens
Nubile Girls Images
Nubile Girls Gallery, Picture 1 of 15
Teen Girls Porn Pics
LittleLiana.com [followed by LittleLiana.com Image#1]
Nude Teen Pussy Young, Porn Pics
LittleLiana.com Image #3
LittleLiana.com Image #9
LittleLiana.com Image #12
Naked Pictures, Teens Nude Porn, Hardcore Young Sex
Free Photo Porn Gallery erotic-ladies
Young Pussy Photos and Hot Girls Porn—Fresh Teen Pics
TeensLoveHuge Cocks presents Willow Hayes in Pussy Willow
Real Girls - Tons of high quilty teenie's galleries
Petite 18-19 year old teenies
LittleLiana.com
LittleLiana.com Image #2
LittleLiana.com Image #4
LittleLiana.com Image #5
teenExtrem.com

2. Images Found in Phone's "Cache"

McClintock also located thousands of images in the cache of Haymond's phone. Of these images, McClintock testified that many of them depicted sexually

explicit conduct in the form of adult pornography. She did not give a precise number, and there are no images of adult pornography in the record. McClintock also identified 59 images that depicted minors engaged in sexually explicit conduct. McClintock consulted with a member of the FBI's Internet Crime Task Force, who viewed the images and confirmed that these 59 images contained minors. These 59 images are depicted and listed in Court's Exhibit 1. In addition to the picture, this exhibit sets forth a "name" and a "path" for each image.

The 59 images in Court's Exhibit 1 can be divided into three categories based upon their path. Images 1-43 ("Browser Images") are all pornographic images portraying either young girls engaged in various sexual acts with men or boys or close-ups of young girls' genitalia. The Browser Images contain the following path: "/root/**data**/com.sec.android.app.**sbrowser**/cache/Cache/[number]_0_**embedded**_1.jpg." Based on the evidence presented, this path indicates these particular images originated in the phone's internet browser, were not saved or downloaded to the phone, and were automatically saved to the cache.

Images 44-56 ("Gallery Images") are pornographic images containing young boys engaged in various sexual acts with men or boys. Images 45-47 contain a particular boy, and images 48, 54, and 56 contain a different particular boy. The Gallery Images contain the following path: /Root/**media**/0/Android/data.com.sec.android.**gallery3d**/cache/imgcacheMini.0/imgcachMini.0_**embedded**_[number].jpg. The evidence is less clear as to what this path indicates, and this issue is discussed in detail below.

Images 57-59 ("APK Images") contain young girls engaged in sexual acts. The APK images contain the following path: /Root/**media**/0/Download/**pornvideo**.apk/pornvideo.apk_**embedded**_1.jpg. Based on the evidence presented, these particular images originated in the phone due to the presence of malicious "ransomware" known as Porn Droid, were not intentionally saved or downloaded to the phone, but were nonetheless saved to the cache.

All 59 images share certain characteristics. First, all images resided in the cache when the phone was searched. Penrod described the cache at issue here as a "database," or a single file or folder, that is hidden from the phone's user. McClintock testified that cache refers to the folder within the device that stores the "temporary data and cached images from websites that have been visited by whoever was using the phone." (Hrg. Tr. at 54.) Regardless of the precise meaning of the "cache" at issue in this case, the evidence is undisputed that the cache was hidden from the user, it was impossible or difficult to access without special software such as Cellebrite or Forensic Toolkit, and Haymond did not use or have access to any such software.[4] Evidence also shows that a user may or may not have viewed or accessed an illegal image contained in the "internet cache" when the image was previously displayed. Penrod testified:

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[4] In *United States v. Dobbs*, 629 F.3d 1199, 1202 (10th Cir. 2011), the expert had indicated that a "user may manipulate and control an image stored in the computer's cache" but that Mr. Dobbs had not done so and did not know the cache existed. However, that was not the evidence presented here.

> With Internet cache databases, all that information is automatically downloaded in the background without the user's knowledge. It's a function of almost all Internet browsers, including this one, the Samsung browser, to download all files and data on any web page that happens to be visited. . . . .

(Hrg. Tr. 101-102). This evidence is similar to that explained in *United States v. Dobbs*, 629 F.3d 1199, 1201-02 (10th Cir. 2011):

> As [the expert] explained it, when a person visits a website, the web browser automatically downloads the images of the web page to the computer's cache. The cache is populated with these images regardless of whether they are displayed on the computer's monitor. In other words, a user does not necessarily have to see an image for it to be captured by the computer's automatic-caching function.

Id.

Second, the images are all embedded thumbnail files, or smaller versions of a larger file. Penrod testified that, if the user clicked on a thumbnail, the full-size image would also appear in the cache. Third, the images have no metadata attached to them. This is important because metadata would perhaps allow one or more of the 59 images to be linked by date or time to a particular website visited on October 21, 2015. Without metadata, all the Court knows about the images is that they arrived in the cache file of the phone at some point prior to seizure.

Finally, the images could not be linked to any of the sexually explicit websites Haymond visited on October 21, 2015. Penrod testified that he examined all web-

sites, that they did not contain any of the 59 images, and they contained banners and assurances that all models were 18 years or older. The United States did not present any contrary evidence or otherwise provide any link between the 59 images in the cache and the sexually explicit websites in Haymond's web history.

II. Burden of Proof

"The burden of proof during a revocation hearing is by a preponderance of the evidence, not beyond a reasonable doubt." *Johnson v. United States*, 529 U.S. 694, 700 (2000). The Court, as the finder of fact, must be only "reasonably satisf[ied] . . . that the defendant has violated the conditions of his supervised release." *Yates v. United States*, 308 F.2d 737, 739 (10th Cir. 1962).

III. Violations II-V

The Court finds Belluomo's testimony regarding Violations II, IV, and V to be credible. Specifically, the Court finds by a preponderance of the evidence that Haymond failed to disclose the existence of two computers located in his residence (Violation II); Haymond repeatedly failed to comply with directives regarding monitoring software (Violation IV); and Haymond failed to attend numerous sex offender treatment appointments despite attempts to accommodate his schedule (Violation V). To the extent Haymond denied or offered explanations for this conduct, the Court credits Bellumo's testimony.

With respect to Violation III, Haymond's web history for October 21, 2015 proves by a preponderance of the evidence that Haymond *viewed* images depicting *sexually explicit conduct* on this date. Although Hay-

mond did not search for sexually explicit material, there are other ways to access websites, including typing in a website address, accessing a website from favorites, or connecting to other websites through links. Haymond argues that these sites could all simply be "redirected links" that Haymond never accessed or viewed. Haymond also argues that because "cookies" and "web history" appear in rapid succession, the "web history" could somehow be the result of "cookies." The Court rejects these arguments as implausible. The quantity and type of web history identified above indicates that Haymond intentionally viewed sexually explicit conduct on this date. Particularly convincing to the Court are the web history entries that involve a web title or banner followed by specific images, such as Nasty Angels—Most Charming Young Girls, immediately followed by p02.jpg; p07.jpg; p08.jpg. The website names or titles indicate they are sexually explicit, and the jpg files indicate images were viewed. The Court is reasonably satisfied that Haymond viewed sexually explicit conduct on October 21, 2015 based on the web history.

In addition, as explained below, the Court concludes Haymond committed Violation I by knowingly possessing 13 images of child pornography, which is an additional factual basis for Violation III.

IV. Violation I

A. Due Process Concerns

The Court *sua sponte* makes a record on certain due process issues related to Violation I. The protections of the Due Process Clause apply to supervised release revocation hearings. *United States v. Medley*, 362 F. App'x 913, 916-17 (10th Cir. 2010). However, a defendant in a revocation proceeding is not entitled to the full panoply of rights due a criminal defendant during trial. *Id.* Federal Rule of Criminal Procedure 32.1(b)(2) outlines the limited rights afforded to a defendant during a revocation proceeding:

> (2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:
>
> (A) written notice of the alleged violation;
>
> (B) disclosure of the evidence against the person;
>
> (C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;
>
> (D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and
>
> (E) an opportunity to make a statement and present any information in mitigation.

See also Medley, 362 F. App'x at 917 (citing *Morrisey v. Brewer*, 408 U.S. 471, 488 (1972)). Notably, a de-

fendant is not entitled to a jury trial or the "beyond a reasonable doubt" standard.

1. Timing of Hearing

There was a considerable delay between Haymond's preliminary hearing and the revocation hearing. This delay was the result of Haymond's request for funds to hire Penrod, Penrod's review of the phone, and other steps aimed at ensuring Haymond's due process rights. Thus, Haymond waived, either actually or constructively, his right to a hearing within a reasonable time.

2. Written Notice

The OSR alleges the following:

> Haymond *possessed* numerous images of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B).

(Doc. 183 at 2 (emphasis added).) During the hearing and closing arguments, counsel for the United States referenced two crimes other than possession: (1) attempted possession, which is a separate crime set forth in 18 U.S.C. § 2252(b)(2); and (2) "accessing with intent to view," which is an alternative crime in 18 U.S.C. § 2252(a)(4)(B).

With respect to written notice, the Tenth Circuit has stated:

> Some circuits have required a high degree of specificity in a violations report or other form of notice about exactly which state or federal statutes have been violated, *see, e.g., United States v. Chatelain*, 360 F.3d 114 (2d Cir.2004); *United States v. Kirtley*, 5 F.3d 1110, 1113 (7th Cir.1993); *United States v. Havier*, 155 F.3d 1090 (9th Cir. 1998), but no case

> from this circuit has required that level of specificity.

United States v. Mullane, 480 F. App'x 908, 911 (10th Cir. 2012). The Tenth Circuit held that the lower court did not commit plain error by requiring only notice that the defendant committed a Class A drug offense to be proven by evidence of drugs, scales, and cash, rather than requiring notice of the specific statute violated. *Id.* The court also noted that the defendant failed to ask for more detailed notice or time to prepare his defense. *Id.*

In this case, the problem is not the lack of notice; it is the specificity of the notice. The United States Probation Office provided notice of one specific statutory violation. The Court concludes it would violate due process to find Haymond committed the crime of attempted possession, which arises under a separate, unspecified provision. Although Haymond may not be entitled to the same type of charging specificity that he would be entitled to in an indictment, he is entitled to rely upon the fact that a specific crime alleged is the only crime he needs to defend.

With respect to "access with intent to view," this is a closer question because it is a second type of crime alleged in the same statutory provision. Again, however, the due process problem lies in the specificity. The OSR does not merely cite § 2252(a)(4)(B); it uses the word "possession." Possessing an image and accessing with intent to view an image are two distinct types of conduct, with different case law governing each. Because this case dealt with highly technical, forensic evidence, this is not simply a semantic difference. Haymond's lawyer and forensic expert pre-

pared a defense to possessing child pornography. Accordingly, the Court also finds insufficient written notice that Haymond needed to defend against "accessing with intent to view." Again, the OSR need not contain dates, times, or other information, and it can be fairly vague and fairly broad. But in this case, the Court finds it would violate Haymond's due process rights to revoke based on anything other than possession, given the important distinctions between possession and the two other crimes now being discussed by the United States. Therefore, the Court limits its analysis to knowing possession.

3. 18 U.S.C. § 3853(k)

Based on the nature of Haymond's prior conviction, a finding that Haymond committed Violation I results in a minimum 5-year term of imprisonment and a 5-year to life term of supervised release. 18 U.S.C. § 3583(k). Ordinarily, revocation based on a Class A felony carries a *maximum* five-year term, still affording the revoking court discretion at sentencing. This Court is troubled by Congress's decision to permit prosecutors to elect a revocation proceeding over a criminal trial, while at the same time secure a minimum 5-year sentence and possibility of a life term on supervised release. This places the Court in a position to conduct what is in essence a criminal trial without a jury, "revoke" based merely on a preponderance of the evidence, and then be bound to a mandatory *minimum* sentence at the *maximum* sentencing range for even the most serious Class A felonies in other revocation proceedings. However, Congress passed § 3583(k), which disincentivizes prosecutors from bringing separate criminal charges (and the greater due process protections they entail) in situ-

ations such as Haymond's. *See generally* Brett M. Shockley, *Protecting Due Process from the Protect Act: The Problems with Increasing Periods of Supervised Release for Sexual Offenders*, 67 Wash. & Lee L. Rev. 353, 387 (2010) ("A prosecutor who is merely discharging her duties should almost always opt for the revocation route, because substantially less effort would be required to 'better serve the public interest' by obtaining 'the most severe penalty' available.").

Thus, although the Court has serious concerns about the process authorized by Congress, the Court must proceed to analyze each element under the preponderance of the evidence standard.

B. Analysis

In relevant part, the statute provides:

> (a) Any person who—
>
> > (B) **knowingly possesses . . . other matter which contain any visual depiction that . . . has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce**, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—
> >
> > (I) the producing of such visual depiction involves **the use of a minor** engaging in sexually explicit conduct; and
> >
> > (ii) such visual depiction is of such conduct;
>
> shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252(a)(4)(B).

1. Use of a Minor

The Court finds by a preponderance of the evidence that production of all 59 images depict minors engaging in sexually explicit conduct. This finding is based on the Court's own review of the images, McClintock's testimony regarding the images, and Haymond's failure to offer any contrary evidence or opinions. The 59 images selected by the United States Probation Office to form the basis for Violation I are not "close calls" as to the age of the child used in the depiction.

2. Knowing Possession

"[P]ossession of child pornography is an image-specific crime," meaning the United States must prove Haymond knowingly possessed at least one of the 59 particular images at issue in this case. *United States v. Haymond*, 672 F.3d 948, 954 (10th Cir. 2012). "Possession" is defined in the Tenth Circuit as holding or having something as one's own or in one's control. *Id.* at 955. At a minimum, possession requires that Haymond have the ability to "access and control" the images. *Id.* Possession can be actual—*i.e.*, knowingly having direct physical control over the image at a given time—or constructive—*i.e.*, knowingly having the power to exercise dominion or control over the image either directly or through another person. *Id.*

The Tenth Circuit has explained the "knowingly" requirement applicable to both possession and receipt of child pornography as follows:

> [F]or possession of child pornography to be knowing, a defendant must know the charged images exist. As we have explained in the analogous context

> of knowing receipt of child pornography, defendants cannot be convicted for having the ability to control something that they do not even know exists. [*United States v.*] *Dobbs*, 629 F.3d [1199, 1207 (10th Cir. 2011]. In other words, the defendant's control or ability to control need[s] to relate to images that the defendant knew existed; otherwise, the defendant's conduct with respect to the images could not be deemed to be knowing. *Id.* To convict Mr. Haymond, the government was required to prove he knew of and also controlled (or at least had the ability to access and control) the *particular* images that formed the basis of the conviction.

Id. (emphasis added).

In discussing the knowledge requirement as applied to possession charges, the Tenth Circuit in *Haymond* discussed its prior decision in *Dobbs*, wherein it reversed a jury conviction for receipt of child pornography based on the defendant's lack of knowledge. *See Dobbs*, 629 F.3d at 1209.[5] The *Haymond* court explained that, in *Dobbs*, there was ample evidence that the defendant had "received" the images because they ended up in the cache file of Dobbs' computer. *Haymond*, 672 F.3d at 956. However, there was insufficient evidence to prove he received them "knowingly" because the government presented no evidence that Dobbs ever: (1) accessed the images stored in his

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[5] *Dobbs* has a vigorous dissent, 629 F.3d at 1209-18, and the majority decision has been criticized by commentators, *see, e.g.*, *J. Elizabeth McBath, Trashing Our System of Justice? Overturning Jury Verdicts Where Evidence Is Found in the Computer's Cache*, 39 Am. J. Crim. L. 381, 382 (2012) (criticizing *Dobbs* as too strict and ignoring evidence of past possession).

computer's cache; (2) knew about his computer's automatic caching function; (3) saw the images (since a forensic expert explained that a user does not necessarily have to see an image for it to be captured by the automatic caching function); or (4) controlled the images by clicking on or enlarging them. *Id.* The *Haymond* court explained that "no reasonable jury could have found [that Dobbs] knew the charged images existed on his computer or had the ability to access and control them, *either when he visited the originating web pages* or later, *after the images had been saved to his computer's cache.*" *Id.* (emphasis added).

Applying the "knowing" definition and analysis in *Dobbs* to the facts on direct appeal in *Haymond*, the Tenth Circuit affirmed. As explained above, Haymond was originally convicted of possessing child pornography images found by FBI agents in "unallocated space" on Haymond's computer hard drive. These charged images "somehow had been deleted and lacked metadata." *Id.* at 952. Further, there "was no forensic evidence to show the origin of the images or how they had been deleted—that is, whether by the user or by the computer's automated processes with no prompting at all from the user." *Id.* at 952-53. However, Haymond had admitted during interviews that "he had been downloading child pornography [from Limewire] once or twice every month or two, and that after downloading the files, he would clean the registry, reformat his computer's hard drive, and reinstall his Windows operating system." *Id.*

The Tenth Circuit found Haymond knowingly possessed the charged images, highlighting factual distinc-

tions between Dobbs' knowledge and Haymond's knowledge:

> In this case, unlike in *Dobbs*, there was ample evidence from which a reasonable jury could infer Mr. Haymond knew the charged images were on his computer because he searched for and then downloaded them from LimeWire. Here, Mr. Haymond admitted to frequently searching for and downloading child pornography from LimeWire. Mr. Carter testified he found the LimeWire program on Mr. Haymond's computer. The government also introduced three images of child pornography that Agent Whisman found in Mr. Haymond's shared LimeWire folder, which the district court permitted the jury to consider as "proof of . . . [the] absence of mistake," Fed. R. Evid. 404(b), a ruling that is not challenged on appeal. The jury was not required to credit Mr. Haymond's assertions that he inadvertently downloaded child pornography from LimeWire while attempting to obtain music, particularly when he had admitted he was addicted to child pornography and used LimeWire to search for and download it. *It was thus permissible for the jury to infer that Mr. Haymond used LimeWire exclusively to search for and download child pornography.* Viewing the evidence in the light most favorable to the verdict, we conclude it was sufficient to permit a rational jury to find beyond a reasonable doubt that *Mr. Haymond knew the charged images were on his computer once he deliberately selected and downloaded them from LimeWire.*

Id. (emphasis added). Although Penrod had testified that the images "were thumbnails which came from

web pages and could not have come from Limewire," the FBI agent testified it "was not possible to determine whether the images were thumbnails." *Id.* at 956 n.15. Thus, a jury could infer that Haymond "used Limewire exclusively to search for and download child pornography." *Id.* at 956. This inference was critical because there was nothing linking the seven charged images with any particular Limewire search. In order for the knowledge to be "image specific," therefore, the jury had to plausibly infer that *all* child pornography in Haymond's unallocated space originated exclusively from Limewire downloads rather than an internet browser.

As to Haymond's ability to exercise control over the seven charged images, the court reasoned:

> Unlike the defendant in *Dobbs*, who sought out child pornography on internet websites, Mr. Haymond admitted to seeking out and downloading child pornography through peer-to-peer programs, including LimeWire. As the defense's own forensic specialists testified, downloading from LimeWire does not occur automatically. It requires the user to highlight the names of the file or files he wishes to download and then to press "enter." In contrast to the caching process at issue in *Dobbs*, which occurs automatically, this type of volitional downloading entails "control" sufficient to establish actual possession. Accordingly, the evidence here was sufficient to permit a reasonable jury to conclude beyond a reasonable doubt that Mr. Haymond "knowingly possessed" the charged images.

Id. at 956-57. Yet again, important information is contained in a footnote:

> Because we conclude there was sufficient evidence to establish Mr. Haymond knowingly possessed the images by downloading them, we need not decide whether he constructively or actually possessed the charged images after they were deleted and resided in his computer's unallocated space. As a result, *United States v. Flyer*, 633 F.3d 911 (9th Cir. 2011), which held the defendant could not "knowingly possess" child pornography *once it had reached his computer's unallocated space*, is inapposite. Nor do we decide whether, as the government claims, Mr. Haymond's admissions were sufficient to prove he exercised control over those particular images by deleting them.

Id. at 957 n.16 (emphasis added). This footnote indicates that the Tenth Circuit affirmed Haymond's conviction on a theory of Haymond's knowing possession in the past. Specifically, Haymond had knowingly possessed the seven images at a previous time when he downloaded them from Limewire, although they existed only in unallocated space when his computer was searched. The court did not reach two other questions: (1) whether he possessed them in the unallocated space, in light of admissions and other circumstantial evidence; and (2) whether his deletion of the charged images was sufficient to prove past possession.

Applying the hearing evidence in this case to the legal principles articulated in *Haymond* and *Dobbs* is not a straight-forward task. Commentators have struggled with questions similar to those presented here. *See generally McBath*, 39 Am. J. Crim. L. at 382, *supra* note 5; Katie Gant, *Crying over the Cache: Why*

Technology Has Compromised the Uniform Application of Child Pornography Laws, 81 Fordham L. Rev. 319, 322 (2012) (analyzing what "knowingly" means "in a technologically advanced day and age"). When encouraged to do so by the Court at the close of evidence, the United States declined to offer additional briefing setting forth the law in conjunction with the hearing evidence. Thus, the legal arguments in Haymond's brief stand largely unrebutted.[6]

a. Browser Images/APK Images

The United States failed to prove by a preponderance of the evidence that Haymond knowingly possessed the Browser Images or the APK Images. The Court finds insufficient evidence to show that Haymond, while on supervised release, either: (1) conducted searches related to these images or other child pornography; (2) accessed websites containing these images or other child pornography; (3) downloaded these images from a peer-to-peer network or the internet; (4) clicked on or enlarged these images while they were in the browser or the cache; (5) attempted to delete these images from the cache; or (6) used any "washing" software in attempt to delete these images from the cache.

With respect to the Browser Images, the United States must do more than merely show the images

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[6] Rather than offer briefing, the United States simply argued that *Dobbs* does not apply to possession cases because it was a receipt case. Even a cursory reading of *Haymond*, however, reveals that the Tenth Circuit views *Dobbs*' "knowing receipt" analysis as highly relevant to "knowing possession."

were in the cache file of a phone possessed and controlled by Haymond. This is because, under Tenth Circuit law explained above, a user does not necessarily view, access, or control images that are automatically cached from an internet browser. In this case, in contrast to Haymond's original case, the evidence of any searching or volitional acts related to the Browser Images is wholly lacking. With respect to the APK Images, they arrived in the cache via malicious software known as Porn Droid. Penrod's testimony indicates that a user does not necessarily view, access, or control images from this type of malicious software, and there is no evidence that Haymond possessed or took any volitional acts whatsoever related to those images. Accordingly, the United States has failed to show Haymond knowingly accessed, controlled, or otherwise possessed the Browser Images or the APK Images (1) at any point in time prior to the search of his phone, or (2) at the time the phone was searched. The majority's reasoning in *Dobbs*, as explained and amplified in *Haymond*, is directly on point with respect to the Browser Images and APK Images.

b. Gallery Images

For the same reasons explained above, the United States failed to prove knowing possession of the Gallery Images based merely on their existence in the cache at the time Haymond's phone was searched. However, the Gallery Images pose a more difficult question on the issue of past possession, *i.e.*, whether Haymond knowingly possessed the Gallery Images at a point in time prior to search. The crucial technical question is whether the "3d gallery" designation in the path tends to show Haymond exercised control over the images at

a previous point in time. If the path tends to prove Haymond saved or had access to the images in an application on his phone, this is a crucial distinction from the Browser Images and APK Images.

Curiously, the United States did not highlight the different path or separately discuss the Gallery Images during its case in chief. Instead, this distinction was elicited during Penrod's testimony. The critical testimony relied upon by the Court in reaching its decision is set forth below:

[Cross-Examination by United States]

Q. So, going back to prior when you talked about the 59 images appearing from the S browser cache file, not only do we have the pornvideo app as a source of three of the images, but we have the Gallery 3D, the photo viewing app, as responsible for 13 of the images; is that correct?

A. Correct.

Q. And your rationale with respect to how the website loads and the items that are not visible at the bottom of the web page, that's not applicable to Gallery 3D because it's not a website; right?

A. Yeah, it functions in the same way. It's simply a cache of thumbnails that are created through Gallery in almost the exact same method or process.

Q. Okay. So when you were talking about being unable to potentially see items that were in the cached file, you were talking about the Samsung browser; is that right?

A. That's right.

Q. Okay. Now, you would agree with me that it doesn't take a—that 99.9 percent of users that have an Android phone and have Gallery 3D, that they can, without special software, navigate to their photo gallery?

A. Correct, yes.

Q. And within this piece of the phone that is accessible to your average user, an app that comes stock or is an easily downloadable app for Samsung users, they have the ability to look at photos through the Gallery 3D application?

A. That's correct.

Q. And—

A. Through Gallery.

Q. Through Gallery?

A. The Gallery, right.

Q. So a cached file from the Gallery indicates that, just the same way as for the Samsung browser, that at one point an image that corresponded to that cached file was present in that application?

A. Correct.

. . .

[Redirect by Lunn]

Q. Now, how is it that a person would not know about the images that are in the Android gallery if they wound up in his cache?

A. *Well, the gallery cache functions in the same way that the browser cache does: it's a cached database and it contains thumbnails. If your phone has a large number of images on it, that all those images are going to be represented, once Gallery finds them, they'll be represented in the Gallery 3D cache folder, cache database.*

Q. And Mr. Haymond's phone had a large number of images on it; is that a fair statement?

A. Yes.

Q. We're talking about tens of thousands of images; is that right?

A. Yes, that's correct.

Q. So, the fact that something is in the—coming from the Android Gallery doesn't necessarily mean that he has gone down and looked at every single one of those 10-, 20-, 30,000 images?

A. Well, a significant number of those images are images that are in cache, they're spread out through the—they're part of various programs, for example, *so those types of files would not end up in Gallery 3D. Just it's going to go out and look for actual images throughout the phone.*

Q. Now then, and so it's possible under those circumstances that somebody can actually have a —can get something in their computer cache from the Android Gallery and not know about those images?

A. *Yeah, that's absolutely true because the Gallery 3D cache database contains images from all*

over the phone, not just from one particular folder on the phone, but from all over the phone.

. . .

[Re-Cross by United States]

Q. You testified on cross-examination, and then again on redirect examination, that the way the gallery works is it searches the phone for what images may be available on the phone; correct?

A. Correct.

Q. Gallery doesn't search the Internet for what might be available in the universe of images on the Internet?

A. No.

Q. So Gallery is only going to aggregate or show you the photo depictions of items on your phone?

A. Correct.

Q. And Mr. Lunn's question to you was that it was possible to have these in your gallery and not know they were there. I believe he asked you that question. Do you recall?

A. Yes.

Q. But in this case there's not an explanation that's similar to the Samsung browser that explains how they got there; is that correct?

A. That's correct, yes.

Q. So you said before on direct examination that there is no evidence on the phone that somebody clicked on or enlarged a photo or moved a

photo between folders. But if the person were to acquire the suspected images from the Internet, its presence in the Gallery would indicate a movement of sorts, that it moved from just being something available on a web page to actually being on the phone?

A. Well, again, the rules for this cache are just like the cache in the web browsers; there's nothing here that tells you anything about these images. It's not telling you how, when, where they were other than the fact that they're inside this cache.

Q. So, Mr. Penrod, Gallery shows the images that are on the phone?

A. Correct.

Q. Not what's on the Internet, not what's potentially available, but what's actually on the phone?

A. That's correct.

Q. And what we know, without knowing where on the phone it was located, is that somehow it got onto the phone?

A. Correct.

(Hrg. Tr. 131:22-133:7; 136:25-138:6; 141:6-142:20 (emphases added).)

Based on this testimony and other circumstantial evidence, the Court concludes it is more likely than not that Haymond knowingly possessed the Gallery Images at a point in time prior to search of the phone. First, the Court finds Haymond had nearly exclusive

use and possession of his password-protected phone and rejects any argument that someone other than Haymond possessed the phone at relevant times.

Second, the Court finds that only those images actually "on the phone" (and not images merely accessed or viewed on the phone using a browser application) would have a "gallery 3d" path when found in the cache. The Court interprets "on the phone" to mean saved, downloaded, or otherwise accessible on the phone in some application for viewing at the user's discretion. The Court recognizes that Penrod's testimony is not perfectly clear on this point, particularly during recross. However, based on careful examination of his testimony as a whole, the Court finds by a preponderance of the evidence that Haymond knowingly took some volitional act related to the Gallery Images that resulted in the images being on his phone in a manner consistent with knowing possession. Although the images were no longer in an accessible area of the phone at the time of the search, the path convinces the Court that these 13 images previously resided in an accessible area of Haymond's phone and were under his control. This is distinct from the Browser Images, which, under the Tenth Circuit's reasoning in *Haymond* and *Dobbs*, were not necessarily saved, downloaded, viewed, accessed, or controlled in any manner prior to residing in the cache. This is also distinct from the APK Images, which arrived to the phone via malicious software.

Third, the path demonstrates that Haymond took prior volitional actions with regard to the Gallery Images. In *Haymond*, the Tenth Circuit reasoned that volitional downloads from Limewire provided evidence

that Haymond knowingly possessed the images prior to their arrival in the "unallocated space" of his computer. Saving, downloading, or otherwise placing the image in an application on the phone is a similar volitional act. Further, the evidentiary link between Haymond's prior volitional act(s) and the Gallery Images found in the cache is even greater than that present between Haymond's Limewire downloads and the "Brad and Bry" images found in the unallocated space. In order for there to be an image-specific link to the Brad and Bry images, the jury had to conclude all images in the unallocated space necessarily originated as Limewire downloads. Here, based on the path, there is stronger evidence that each of the 13 Gallery Images were once knowingly possessed by Haymond.

Finally, although the United States failed to highlight this key fact, the 13 Gallery Images depict sexual acts between young boys or between boys and adult males. Viewing the 59 images as a whole, these 13 images stand out as distinct from the Browser Images and the APK Images and are more consistent with images forming the basis of Haymond's original conviction. Therefore, the content of these 13 images contributes to this Court's finding of knowing possession of the Gallery Images.

3. Interstate Commerce

For the Gallery Images, the next question is whether the United States met its burden of proving, by a preponderance of the evidence, that the digital images "contain any visual depiction . . . that has been . . . transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce . . . by any means including by com-

puter[.]" 28 U.S.C. § 2252(a)(4)(B). This language, which was revised by the Effective Child Pornography Prosecution Act of 2007 ("ECPPA"), Pub. L. No. 110-358, § 102(7), 122 Stat. 4001 (2008), represents an expansion of the statutory language governing Haymond's original conviction.[7]

The ECPPA was a direct response to the Tenth Circuit's decision in *United States v. Schaefer*, 501 F.3d 1197 (10th Cir. 2007), which held that use of the Internet alone did not confer federal jurisdiction. *See* Jonathan R. Gray, *United States v. Schaefer and United States v. Sturm: Why the Federal Government Should Regulate All Internet Use As Interstate Commerce*, 90 Denv. U. L. Rev. 691, 709 (2012) ("In direct response to *Schaefer*, Congress expressed its intent that 'transmission of child pornography using the Internet constitutes transportation in interstate commerce.'") (quoting public law). By adding "any means or facility of interstate commerce" and "in or affecting interstate commerce," Congress "made it clear to the courts that it intended the statute to reach the full extent of Congress's Commerce Clause power" and "answered the call from the Tenth Circuit in *Schaefer* demanding more precise language." *Id.* This expanded language has withstood constitutional challenges under the Commerce Clause. *See e.g., United States v. Konn*, 634 F. App'x 818, 821 (2d Cir. 2015) (re-

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[7] On appeal, the Tenth Circuit affirmed the interstate commerce element based on an FBI agent's testimony that the "Brad and Bry" images were originally taken in Florida and had necessarily crossed state lines at some time before reaching Haymond's computer in Oklahoma. *See Haymond*, 672 F.3d at 954. Much less evidence is required under the current statute.

jecting argument that ECPPA exceeded Congress's commerce power because "there can be no question that the Internet is a channel and instrumentality of interstate commerce; and Congress may regulate and protect the instrumentalities of interstate commerce").

Under this relaxed standard, the United States need only show that it is more likely than not that the Gallery Images arrived on Haymond's phone from use of the internet, rather than some other means such as Haymond taking the photos himself. The Court is reasonably satisfied these images, which are thumbnails, were originally saved or downloaded to Haymond's phone from the internet.

V. Conclusion

The United States failed to call its own forensic expert, failed to assist the Court in applying Tenth Circuit law on "knowing possession" to its evidence, and failed to prove Haymond knowingly possessed any of the 59 images beyond a reasonable doubt. If this were a criminal trial and the Court were the jury, the United States would have lost. This highlights the Court's concerns with § 3583(k) and the mandatory penalties it carries. Nonetheless, for reasons explained above, the Court finds it is more likely than not that Haymond knowingly possessed, accessed, controlled, and viewed the thirteen Gallery Images at some time prior to search of his phone, in violation of 18 U.S.C. § 2252(a)(4)(B).

Accordingly, the Court hereby revokes Haymond's term of supervised release based on a finding that he committed Violations I-V. The United States Probation Office is ordered to prepare a Presentence Inves-

tigation Report. Sentencing is set for Friday, September 16, 2016, at 11:00 a.m.

DATED THIS 2nd day of Aug., 2016.

/s/ TERENCE KERN
TERENCE KERN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-5156

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANDRE RALPH HAYMOND, DEFENDANT-APPELLANT

ORDER

[Filed: Jan. 16, 2018]

Before: **BRISCOE**, **KELLY**, and **MCHUGH**, Circuit Judges.

Appellee's petition for rehearing is denied. Judge Kelly would grant panel rehearing.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Appellee's motion to file a reply to the response to the petition for panel rehearing or for rehearing en banc is denied.

Entered for the Court

/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER, Clerk

APPENDIX D

18 U.S.C. 3583 (2012 & Supp. IV 2016) provides:

Inclusion of a term of supervised release after imprisonment

(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the fac-

tors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for

use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4).[1] The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

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[1] See References in Text note below.

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) MODIFICATION OF CONDITIONS OR REVOCATION. —The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

(1) terminate a term of supervised release and discharge the defendant released at any time after

the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more

than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) MANDATORY REVOCATION FOR POSSESSION OF CONTROLLED SUBSTANCE OR FIREARM OR FOR REFUSAL TO COMPLY WITH DRUG TESTING.—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) SUPERVISED RELEASE FOLLOWING REVOCATION.—When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) DELAYED REVOCATION.—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) SUPERVISED RELEASE TERMS FOR TERRORISM PREDICATES.—Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

No. 17-1672

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANDRE RALPH HAYMOND,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Following his conviction for possession of child pornography, a Class C felony that carried a statutory sentencing range of zero to ten years, a district court judge in a revocation hearing specifically found by only a preponderance of the evidence that Andre Haymond had violated the terms of his supervised release by committing a "second sex offense" as set forth in 18 U.S.C. 3583(k). The statute required the district court to impose a sentence of not less than five years up to life in prison for commission of the new crime, rather than the zero to two-year statutory range ordinarily applicable for revocation in Class C felony cases. Did the enhanced sentencing range carrying a mandatory minimum sentence in the revocation proceeding violate the Court's longstanding jurisprudence guaranteeing a defendant charged with a serious criminal offense to a right to a jury trial under the Fifth and Sixth Amendments?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Andre Ralph Haymond respectfully requests that this Court deny the petition for writ of certiorari. The case represents the first challenge to the constitutionality of 18 U.S.C. 3583(k)'s 2006 amendment, which mandated that district courts impose not less than a mandatory five-year prison term up to life in prison for defendants found by a preponderance of the evidence to have committed a second sex offense. The issue has been raised in a second circuit court, but initial briefing has not been completed. Although the government sought rehearing, with the exception of the lone judge filing the dissent, none of the other judges on the Tenth Circuit's diverse court voted for *en banc* review.

The absence of a direct conflict among the circuit courts twelve years after the statute's enactment, combined with the near-unanimity in support of the Tenth Circuit's opinion within that court, suggest that the passage of time would be useful and enable the Court to gather additional circuit court opinions. This approach would be consistent with the Court's tradition to avoid the premature adjudication of constitutional issues. The statute, moreover, has been seldom used, on average only one to two times a year. Few defendants in the criminal justice system are affected by it. Most importantly, the Tenth Circuit correctly applied this Court's longstanding precedents requiring due process protections and right to a jury trial for

defendants facing such serious criminal charges. Review by this Court is therefore unwarranted.

STATEMENT

A. Legal Background

In 1984, Congress enacted an overhaul of federal sentencing in bipartisan legislation. Legislative history of the Sentencing Reform Act of 1984 showed a determination to cast aside an ineffectual parole system that had been used in the United States for the previous seventy-five years. Note, *Parole Revocation in the Federal System*, 56 Geo. L.J. 705 (1968). "Almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison system," the Senate Report stated. S. Rep. No. 98-225 at 124 (1983), reprinted in 1984 U.S.C.C.A.N. 3221. The legislation replaced parole with a new type of supervision Congress called supervised release.

Supervised release was a short-term period of monitoring by the district court to follow a defendant's sentence of imprisonment. It was not intended to allow a district court judge to impose a new sentence of punishment. "The Committee has concluded that the sentencing purpose of incapacitation and punishment would not be served by a term of supervised release – that the primary goal of such a term is to ease the defendant's transition into the community after the service of a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period of time in prison for punishment or other purposes but still needs supervision and

training after release." *Id.* at 3307. The old parole system, where defendants were released on 'conditional liberty' and could be returned to lengthy prison terms for parole violations, was over. "Under Title II, as reported, a prisoner has completed his prison term when released even if he is released to serve a term of supervised release," Congress stated. *Id.* at 3241.

Initially, supervised release legislation provided no mechanism for re-imprisonment of a defendant for a new criminal law violation. "If he commits a serious violation, he can, depending on the circumstances of the case, be punished for contempt of court or be held pending trial if the violation is a new criminal offense." *Id.* at 3241. Beginning in 1986, however, Congress, without any legislative history to explain its action, enacted legislation that allowed a district court judge to impose limited prison sanctions, based on a finding by a preponderance of the evidence, for violations of supervised release. 18 U.S.C. 3583(e)(4)(1986). For a Class C felony, such as that committed by Andre Haymond, the prison sanction was limited to one year. In 1988, Congress struck the contempt of court sanction language from 18 U.S.C. 3583(e)(3) enacted in 1984, and replaced it with the 1986 provision from 18 U.S.C. 3583(e)(4). In 1994, Congress increased the length of prison sanctions for supervised release. For Mr. Haymond's Class C felony, the maximum prison term sanction was limited to two years.

In 2003, Congress enacted its first version of 18 U.S.C. 3583(k), which is the first sentence of the current statute. The provision increased the

authorized term of supervised release for sex offenders (as defined in the statute) to "any years or life." The legislative history for this provision indicates that Congress believed that the "current length of supervision periods is not consistent with the need presented by many of these offenders for long-term, and in some cases, life-long monitoring and oversight." See H.R. Conf. Rep. No. 108-66, reprinted in 2003 U.S.C.C.A.N. 683, 884. Congress did not amend section 3583(e)(3), which allowed a judge at a revocation hearing to "require a defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release."

Three years later in 2006, Congress enacted the current version of 18 U.S.C. 3583(k), which provided for a mandatory minimum sentence of 5 years for anyone subject to the Sex Offenders Registration and Notification Act (SORNA) based on a district court making a finding the person had committed a violation of a "second sex offense." The legislative history does not indicate that Congress considered the constitutionality of either the potential enhanced life-long revocation prison sentence enacted in 2003 or the mandatory minimum sentence enacted in 2006. *See Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981)(deference given where "Congress expressly considered the question of the statute's constitutionality").

The statutory provisions found unconstitutional by the Tenth Circuit in this case under 18 U.S.C. 3583(k) are the opposite of what supervised release

was meant to be under the Sentencing Reform Act of 1984. The statute reads: "If a defendant required to register under the Sex Offender Registration and Notification Act commits any offense under Chapter...110, for which imprisonment for a longer term than one year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment.... Such term shall not be less than five years." The severity of the sanction imposed by 3583(k) was dramatic. A person like Mr. Haymond was required to be sentenced to not less than five years and up to life if the judge alone believed he had committed a second sex offense under a preponderance of the evidence standard.

B. Proceedings in the District Court

Andre Haymond was 18 years old when he was first charged with possession of child pornography under 18 U.S.C. 2252(a)(4)(B) and (b)(2). See *United States v. Haymond,* 672 F.3d 948, 950 (10th Cir. 2010). His case was not the run-of-the-mill child pornography case, where most defendants' computers or smartphones contain hundreds, even thousands, of contraband images that have been downloaded daily. *See United States v. Helton,* 782 F.3d 148, 158 n. 4 (4th Cir. 2015) (Gregory, J. concurring) (79% of non-production cases have 600 or more images) (quoting United States Sentencing Comm's Use of Guidelines and Specific Offense Characteristics, 40-41 (2013)). The government based its case against Mr. Haymond on seven tiny thumbnail images of child pornography. These images were never

clicked and were found inaccessible to a normal computer user like Mr. Haymond in his computer's Internet cache. The images contained no metadata to make it possible to determine how or when the images got there. *Haymond,* 672 F.3d at 952. A total of only 9 illicit images of minors were found on his computer. *Id.,* n. 9.

Mr. Haymond said he had never seen any of the illicit images. The computer contained over 60,000 images he had made of heavy metal music and gaming activities received from unknown persons or entities over the Internet. *Id.* A government agent testified Mr. Haymond said he was "addicted to child pornography," statements which most agents would have been expected to record, *see Helton,* 782 F.3d at 150, but were not. Mr. Haymond emphatically denied he ever made them. *Haymond,* 672 F.3d at 951, n. 4. He pled not guilty, had a jury trial, but was convicted. He was sentenced to 38 months in prison, within the applicable Sentencing Guidelines range, to be followed by 10 years of supervised release. Pet. App. 37a. Mr. Haymond appealed, but his conviction was affirmed. *United States v. Haymond,* 672 F.3d 948 (10th Cir. 2012). This Court denied certiorari. 567 U.S. 923 (2012).

Upon his release from prison in April, 2013, Mr. Haymond obtained a job, Pet. App. 37a, but spent his leisure time still engaged in gaming activities on the Internet with persons he had never met. "Internet gaming is a dangerous process," a forensic expert testified at his revocation hearing, "because you're

exposing your phone...or your computer...to attack from software infiltration or by a hacker" (CA10 record, Vol. II:172). His probation officer required him to take lie detector tests, which asked whether he had possessed or viewed child pornography since the previous test. Mr. Haymond answered "No" each time, and the test indicated no deception every time he took it. The last such test was taken in September of 2015. Pet. App. 38a.

In October of 2015, Mr. Haymond's probation officer searched his smartphone. Again, thousands of images appeared on the phone, Pet. App. 38a, linked to Mr. Haymond's gaming activities and music interests. Again, however, a few thumbnail images of child pornography, never clicked on, were found inside his Internet browser cache, his Gallery photo cache, or from malware. Pet. App. 42a-43a. All of these images were distinctive, in that they were embedded, which means they were a "file within a file" (CA10, Vol. II:130). These images had somehow arrived on Mr. Haymond's smartphone and been swept into the phone's cache by an automatic downloading process unique to the smartphone. *Id.* Had he clicked on any of these images, a second identical image would have appeared, but that never occurred. Pet. App. 44a. As before, none of these images were accessible, and none of the contraband images possessed any metadata to show how or when they got onto the smartphone. Pet. App. 43a.

Although the government claims the district court found Mr. Haymond had viewed the child pornography on the inaccessible, embedded images, Pet.

at 6, this is incorrect. The district court thought Mr. Haymond had viewed legal adult pornography that had cascaded onto his smartphone, possibly from redirected links after Mr. Haymond had unwisely entered the search term "open relationships" the evening before the search. Pet. App. 40a. Mr. Haymond disputed he accessed this adult pornography, but he did not appeal the district court's adverse ruling that constituted a minor Grade C violation of his supervised release. The district court found no connection between the adult pornography and the embedded child pornography images hidden in Mr. Haymond's smartphone cache. Pet. App. 44a.

Mr. Haymond was charged with a violation of his supervised release under 18 U.S.C. 3583(k), based on his alleged commission of a second sex offense, which was his second alleged possession of child pornography. The penalty for such a violation was not less than five years. Such a sentence, even at the low end, was well in excess of the 38-month prison term imposed for his original child pornography possession offense. At the high end, which could include as much as a life sentence, it exposed the 26-year-old to a period of incarceration far in excess of the ten-year statutory maximum term of imprisonment for his original offense of conviction.

The district court ultimately found Mr. Haymond illegally possessed 13 contraband images (the ones found in the Gallery photo cache), holding he had volitionally downloaded those images. Pet. App. 59a-66a. This finding was later held to be clear error by the Tenth Circuit. Pet. App. 4a-9a. The

district court, however, in no uncertain terms, stated the government had not proved that Mr. Haymond had knowingly possessed any of the contraband images beyond a reasonable doubt found in the Internet browser cache, the Gallery cache, or from malware. "The United States failed...to prove Haymond possessed any of the 59 (illicit) images beyond a reasonable doubt," the court held. Pet. App. 68a. "If this were a criminal trial, and the Court were the jury, the United States would have lost." *Id.* The Tenth Circuit later agreed, even though it found sufficient evidence to sustain the possession of child pornography revocation violation. "This is a close case," the appellate court stated, "even under the preponderance of the evidence standard..." Pet. App. 9a.

The district court similarly spared no words in attacking 18 U.S.C. 3583(k). In its opinion and order, the district court stated: "This Court is troubled by Congress's decision to permit prosecutors to elect a revocation proceeding over a criminal trial, while at the same time secure a minimum 5-year sentence and the possibility of a life term on supervised release." Pet. App. 50a. "This places the Court in a position to conduct what is in essence a criminal trial without a jury, 'revoke' based merely on a preponderance of the evidence, and then be bound to a mandatory *minimum* sentence at the *maximum* sentencing range for even the most serious Class A felonies in other revocation proceedings." *Id.* (emphasis in original)

In advance of his sentencing on the district court's revocation of his supervised release, Mr. Haymond argued the mandatory and enhanced sentencing provisions of 18 U.S.C. 3583(k) were unconstitutional (CA10 record, Vol. I:179-184). At the revocation sentencing, the district court reiterated its concerns expressed in the opinion and order. "It's repugnant to me that there is a mandatory five-year sentence in such a case where a defendant does not have the opportunity to ask for a jury or to be tried under what should be the legal standard that is beyond a reasonable doubt...," the district court stated. BIO App. 9. "So the court's considered the sentencing guideline along with the factors set forth in 18 U.S.C. 3553(a) to reach a sentence...I don't know that it is an appropriate or reasonable sentence in the case, but I'm supposed to say its appropriate and reasonable." *Id.*

But for the provision of 18 U.S.C. 3583(k), the district court said it "would have looked at Haymond's revocation as a grade B violation and probably would have sentenced in the range of two years or less." BIO App. 10. Such a sentence would have been the statutory maximum prison sanction for a supervised release violation under 18 U.S.C. 3583(e)(3) for all defendants convicted of Class C felonies other than those found to be repeat sex offenders. Despite its misgivings about section 3583(k), the district court nevertheless applied the provision and sentenced Mr. Haymond to the mandatory minimum five years in prison, to be followed by five years of supervised release.

C. Proceedings in the Court of Appeals

On appeal by Mr. Haymond, the Tenth Circuit vacated his revocation sentence and remanded for resentencing. "We conclude that 18 U.S.C. Sect. 3583(k) violates the Fifth and Sixth Amendments because (1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range, and (2) it imposes heightened punishment on sex offenders expressly based, not on their original crime of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt and for which they may be separately charged, convicted and punished." Pet. App. 15a.

In so ruling, the Tenth Circuit applied this Court's precedent from five key cases involving due process and a defendant's right to a jury trial. *Morrissey v. Brewer,* 408 U.S 471 (1972), held that due process under the Fifth Amendment must be flexible to protect a defendant where a grievous loss could occur. The Tenth Circuit found this language could apply to defendants in revocation hearings, where a substantial mandatory minimum prison sentence is imposed. Pet. App. 19a. *Johnson v. United States*, the court noted, held that using revocation of supervised release as a punishment, rather than as a rehabilitative tool, would raise serious constitutional questions. *Id.* (citing 529 U.S. 694 (2000). The Tenth Circuit also relied on *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348 (2000), in which this Court used the Fifth and Sixth Amendments to strike down the increasing

use of sentencing enhancements enacted by legislative bodies that imposed often substantial increases in sentences based on facts never presented to a jury. Pet. App. 17a. The court ultimately focused on *United States v. Booker,* 543 U.S. 220 (2005), a federal sentencing case, for its broad application of the Sixth Amendment that would make possible its use in revocation proceedings like Mr. Haymond's, where substantial enhancements to the original sentence are imposed, based on the commission of an entirely new criminal offense. Pet. App. 16a, 20a.

Finally, the Tenth Circuit relied on *Alleyne v. United States,* 133 S.Ct. 2151 (2012), to find that the imposition of a mandatory minimum in a revocation proceeding, when one had not applied to a defendant's original conviction, was just as much an impermissible sentencing enhancement as if it had come about at the time of the original sentence. Pet. App. 16a. The Tenth Circuit applied the same remedy, excision of the impermissible language from 18 U.S.C. 3583(k), that had been held proper in *Booker.* Pet. App. 26a-28a.

The government filed a petition for a panel rehearing and for rehearing *en banc* (CA 10 record, 10/16/2017). It raised arguments identical to those raised before this Court in its petition for certiorari. The government insists that revocation hearings are a No Man's Land, where constitutional protections are limited. Relying on language originally formulated during the parole era in *Morrissey v. Brewer,* 408 U.S. 471 (1972), the government

argues that revocation proceedings are not part of a "criminal prosecution" as described in the text of the Sixth Amendment. Pet. 9. To the extent Congress enacted a statute that makes possible for a district court to decide under a preponderance of the evidence standard that a new sex offense has been committed that would constitute a violation of a previously-convicted sex offender's supervised release conditions (what the government refers to, using the old parole jargon, as his "conditional form of liberty," Pet. at 4), the government argues nothing should prohibit sending the supervised release violator to prison for life as a 'sanction.' Pet. 12, citing *United States v. Haymond,* 869 F.3d 1153, 1168 (10th Cir. 2017) (Kelly, J., dissenting). The government further argues that nothing should prevent Congress from telling the judge that the supervised release sanction can be no less than 5 years, even if the sanction eliminates the judge's discretion in handling revocations of supervised release and greatly exceeds the punishment ordered for the original offense, which had no mandatory minimum term at all. Pet. at 16.

The Tenth Circuit denied both the government's petition for panel rehearing and for a rehearing *en banc.* Pet. App. 70a. The panel's dissenting judge voted for a rehearing before the panel, but no judge requested that the court be polled for an *en banc* hearing. *Id.* The government did not seek to stay the mandate. The case was remanded to the district court, where Mr. Haymond was sentenced to time served on February 14, 2018, approximately 28 months after his arrest and detention on the supervised release violation.

The district court also imposed an additional 24 months of supervised release. The sentence was subject to the government's right to appeal the Tenth Circuit's decision.

ARGUMENT

Three reasons compel restraint by this Court in granting certiorari in this case. First, this is the sole circuit court decision addressing 18 U.S.C. 3583(k)'s constitutionality following its enactment twelve years ago. Second, the statute has been rarely invoked. Few defendants within the criminal justice system are affected by it. Most importantly, the Tenth Circuit's straightforward approach applying this Court's Fifth and Sixth Amendment jurisprudence is a correct analysis of the law.

I. The Tenth Circuit Correctly Applied Longstanding Supreme Court Precedent Guaranteeing a Defendant a Right to a Jury Trial When Charged with a New Serious Offense

The Tenth Circuit decision in this case faithfully adheres to this Court's well-known precedents. Both the Fifth and Sixth Amendments apply to Mr. Haymond's case. "General principles of due process govern the procedures that must be afforded a defendant in a revocation hearing," the court stated, Pet. App. 19a, noting *Morrissey's* holding that termination of a parolee often "inflicts a 'grievous loss' on the parolee and others." *Morrissey,* 408 U.S. at 481. As *Morrissey* held, "Due process is flexible and calls for such procedural protections as the particular situation demands." *Id.*

This Court has long recognized that the Constitution insures the right to a jury trial whenever a defendant faces the possibility of a long prison

sentence, regardless of the criminal proceeding. Over a century ago, this Court wrote, "The word 'crime,' in its more extended sense comprehends every violation of public law; in its limited sense, it embraces offenses of a serious or atrocious character." *Callan v. Wilson,* 127 U.S. 540, 547 (1888). The Court found "no conflict" between the Sixth Amendment and other provisions of the Constitution guaranteeing a right to a jury trial whenever a defendant was charged with such a crime. *Id.* See also *Bloom v. Illinois,* 391 U.S. 195, 211 (1968) (citing constitutional provisions common in right to jury trial analysis).

The Tenth Circuit's decision is consistent with these themes. Although the revocation of supervised release may not directly contemplate a "criminal prosecution" under the terms of the Sixth Amendment, the court held that it can indirectly affect the Sixth Amendment if facts presented based on a new alleged criminal act increase the sentencing range represented by the original offense of conviction. "Holding that the Sixth Amendment does not require particular procedures at a revocation hearing is not the same as holding that a defendant, once convicted of any crime, loses all Sixth Amendment rights during the term of imprisonment and supervised release." *Id.* Citing this Court's decision in *Johnson,* the court continued, "To the contrary, we know that these defendants retain the right to be free from new criminal prosecutions that would violate the Fifth and Sixth Amendments." Pet. App. 19a.

The Tenth Circuit held that *Johnson's* warning, that "serious constitutional concerns" would arise if revocation became "punishment for a violation of the conditions of supervised release," must be heeded. Pet. App. 21a. "When Haymond was originally convicted by a jury, the sentencing judge was authorized to impose a term of imprisonment between zero and ten years," the court wrote. Pet. App. 20a. "After the judge found, by a preponderance of the evidence, however, that Haymond had violated a particular condition of his supervised release the mandatory provisions of Sect. 3583(k) required that Haymond be sentenced to a term of reincarceration of at least five years, up to a maximum term of life," the court continued. *Id.* This increased sentencing range, well beyond that authorized by Mr. Haymond's initial conviction, could be characterized in no other way than punishment for commission of a new designated offense. Pet. App. 21a.

These increased statutory ranges in Mr. Haymond's case, the Tenth Circuit noted, were reminiscent of the sentencing enhancements in *Apprendi* found unconstitutional by the Court. Pet. App. 15a-17a. The ruling in *Apprendi* had been influenced by the Court's decision a year earlier in *Jones v. United States,* 526 U.S. 227 (1999), a case involving sentencing enhancements strikingly similar to those in Mr. Haymond's case. *Jones* involved a defendant whose sentencing range had been increased from a maximum 15 years, based on facts submitted to a jury, to life, based on additional facts a judge could find imposing sentence enhancements by a

preponderance of the evidence after the verdict. Applying both the Fifth and Sixth Amendments, the Court held the process unconstitutional. In *Apprendi,* relying often on its decision in *Jones,* the Court noted the defendant's sentencing range had jumped from a maximum of 10 years based on facts presented to the jury to 20 years based on enhancements not submitted to the jury that were decided by a judge by a preponderance of the evidence. "It can hardly be said that the potential doubling of one's sentence – from 10 years to 20 – has no more than a nominal effect...(T)he differential here is unquestionably of constitutional significance." *Apprendi,* 530 U.S. at 495.

The Tenth Circuit ultimately focused on this Court's *Booker* decision. "*Booker,*" the court noted, "itself relied on the Sixth Amendment in holding that a judge, during sentencing, must retain discretion." Pet. App. 20a. The court then quoted *Booker:* "It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance." *Id.* The court emphasized that 18 U.S.C. 3583(k) cannot be excused from accountability simply because it is a revocation statute. "If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt," *Id.* (quoting *Ring v. Arizona,* 536 U.S. 584, 602 (2002)). The court found that 18 U.S.C. 3583(k) is "unconstitutional because it circumvents the protections of the Fifth and

Sixth Amendments by expressly imposing an increased punishment for specific subsequent conduct." Pet. App. 21a.

Finally, the Tenth Circuit addressed *Alleyne*. "Regardless of the nature or severity of the defendant's original crime of conviction," the court held, "Sect. 3583(k) imposes a mandatory minimum five-year term of imprisonment for only those specified offenses enumerated," and this "heightened penalty...must be viewed, at least in part, as punishment for the subsequent conduct." Pet. App. 23a. The Tenth Circuit was well aware of the many circuit courts, including the Tenth Circuit itself, that had rejected *Booker's* application to revocation hearings. But *Alleyne's* holding in particular distinguished those cases from Mr. Haymond's. "Discretion is key," the Tenth Circuit held, noting that the mandatory minimum stripped the district court of the flexibility required to oversee defendants on supervised release. Pet. App. 16a. This holding was consistent with the holding in those same circuit court cases. "*Booker* has no bearing on this case because the imposition and revocation of supervised release has always been left to the discretion of the court." *United States v. Carlton,* 442 F.3d 802, 808 (2nd Cir. 2006); see *United States v. Cordova,* 461 F.3d 1184, 1188 (10th Cir. 2006) ("revocation of supervised release has always been left to the discretion of the court"); *United States v. Huerto-Pimental,* 445 F.3d 1220, 1224 (9th Cir. 2006) (revocation "is, and always has been fully discretionary"); *United States v. Dees,* 467 F.3d 847, 853 (3d Cir. 2006) (citing

Huerto-Pimenthal); *United States v. Coleman*, 404 F.3d 1103, 1104-05 (8th Cir. 2005). As the court in *United States v. Hinson*, 429 F.3d 114, 117 (5th Cir. 2005), put it: "Mandatory sentencing guidelines have never been applicable to revocation of supervised release, only advisory policy statements to sentences imposed upon revocation."

The Tenth Circuit holding that "discretion is key" applies similarly to the government's notion that revocation hearings are just administrative proceedings similar to those in *Oregon v. Ice*, 155 U.S. 160 (2009). Just as the circuit courts have held in addressing *Apprendi* issues in revocation matters, *Ice* emphasizes that judges always have had "unfettered discretion" to decide whether a defendant should receive a consecutive or concurrent sentence. *Id.*, 155 U.S. at 714.

After the Tenth Circuit found 18 U.S.C. 3583(k) "unconstitutional and unenforceable," it excised the offending provision. Pet. App. 28a. That remedy was consistent with the Court's ruling in *Booker*. Justice Stevens sought the same remedy the government suggests, Pet. 25, which was to "engraft onto the existing system today's Sixth Amendment 'jury trial' requirement." *Booker*, 543 U.S. at 246 (Stevens, J., dissenting). "The constitutional jury trial requirement would nonetheless affect every case," the Court wrote. "It would affect decisions about whether to go to trial. It would affect the content of plea negotiations. It would alter the judge's role in sentencing..." *Id.* "It would create a system far more complex than what

Congress would have intended." *Id.* Congress' intent was that supervised release was to provide post-release monitoring by a district court judge "to assist individuals in their transition to community life." *Johnson,* 529 U.S. at 710. Engrafting a statute such as 18 U.S.C. 3583(k), where a prosecutor would argue to a jury that a defendant should be sent to prison up to life, in the words of *Booker,* "would destroy the system." *Booker,* 543 U.S. at 252. The Tenth Circuit's conclusion, Pet. App. 28a, is the same as what *Booker* held: "Congress would likely have preferred the excision of some of the Act, namely the Act's mandatory language, to the invalidation of the entire Act." 543 U.S. at 249.

II. Because the Tenth Circuit is the First Court Of Appeals to Address the Constitutionality of 18 U.S.C. 3583(k), No Circuit Conflict Exists

At the moment, only the Tenth Circuit has published an opinion on the constitutionality of 18 U.S.C. 3583(k). Although there is another circuit court decision involving 18 U.S.C. 3583(k), *United States v. Sperling,* 699 F. App'x 636, 637 (9th Cir. 2017), it is not helpful, as it was unpublished and addressed the issue on plain error review. As there were no other circuit court decisions at the time, any error was not plain. As the Government recognizes, Pet. 32, a similarly contested revocation hearing is on appeal in the Seventh Circuit. *United States v. Hollman,* 18-1874 (7th Cir., filed April 23, 2018).

The Tenth Circuit's straightforward approach, based on longstanding precedents of this Court, may well point other circuit courts to the same conclusion. If other circuits in contested cases are in unanimity with the Tenth Circuit decision, the Court's review is made easier. *Durham v. United States,* 401 U.S. 481, 483 (1971). A principal purpose for which certiorari is granted is to resolve conflicts among the United States Courts of Appeals, S.Ct. Rule 10; see *Braxton v. United States,* 500 U.S. 344, 347-48 (1991). The absence of a direct conflict among the circuits has traditionally been a reason for the Court to withhold review. *Bunting v. Mellen,* 541 U.S. 1019, 1021 (2004).

Mr. Haymond recognizes that this Court commonly grants certiorari in cases where "a federal Court of Appeals has held a federal statute unconstitutional." *United States v. Kebodeaux,* 133 S.Ct. 2496, 2501 (2013). However, this Court has denied review in similar constitutional cases when the circuit court opinion, like this one, simply applies well-settled constitutional law. *See, e.g., American Civil Liberties Union v. Mukasey,* 534 F.3d 181 (3d Cir. 2008), *cert. denied,* 129 S.Ct. 1032 (2009) (denying Solicitor General's petition seeking review of appellate decision holding the Child Online Protection Act unconstitutional, where court of appeals applied established First Amendment law); *Valley Broadcasting Co. v. United States,* 107 F.3d 1328 (9th Cir. 1997), *cert. denied,* 522 U.S. 1115 (1998) (denying Solicitor General's petition for review of decision striking down

prohibition on advertising of casino gambling on First Amendment grounds where court of appeals followed established precedent); *ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997) (denying review after court of appeals struck down federal Lead Contamination Control Act as unconstitutional); *Wilson v. N.L.R.B.*, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992) (denying review of decision holding part of National Labor Relations Act violated First Amendment). The Court should find similar justification for denying the government's request for review in this case.

III. Section 3583(k) Appears To Be Used Only Rarely

Even though 18 U.S.C. 3583(k) has been in existence for over twelve years, it is striking that the constitutionality of the provision has never been tested. The reason may be twofold. First, the statute appears to be seldom used. Since its enactment in 2006, the United States Sentencing Commission Datafiles indicate only 18 revocations and sentences, an average of only one or two a year. https://www.gov/research/datafiles/commission-datafiles. Second, it may well be that many of these cases involved defendants who simply admitted to the allegations, as several of the government's referenced cases indicate. See Pet. 29 (citing *United States v. Nesler*, 659 Fed. Appx. 251 (2016), *United States v. Terry*, 690 F. App'x. 358 (6th Cir. 2017), *United States v. Beyers*, 854 F.3d 1041 (8th Cir. 2017)). Admission by the defendant to the facts charged in the revocation petition in *United States v. Work*, 409

F.3d 484 (1st Cir. 2005), likewise eliminates its application as a conflicting circuit court opinion. Because contested cases under 18 U.S.C. 3583(k) appear to be rare, a case like Mr. Haymond's may be of "isolated significance." *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 76 (1955). As Chief Justice Taft once said in *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1923), "(I)t is very important that we be consistent in not granting certiorari except in principles to settlement of which is of importance to the public, as distinguished from the parties."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

_/s/_William D. Lunn_____
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No. 17-1672

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

ANDRE RALPH HAYMOND,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

AFFIDAVIT OF SERVICE

William D. Lunn, attorney for Respondent Andre Ralph Haymond, hereby attests that pursuant to Supreme Court Rule 29, the preceding Brief for Respondent in Opposition to the Petition for Certiorari to United States Court of Appeals for the Tenth Circuit and accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Petitioner by enclosing a copy of these documents in an envelope, first-class prepaid and addressed to:

Mr. Noel J. Francisco
Solicitor General of the United States
Room 5614
Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

and that the envelope was deposited with the United States Postal Service, Tulsa, Oklahoma 74103, on September 13, 2018, and further attests that all parties required to be served have been served.

_____
William D. Lunn

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Subscribed and sworn to before me this 13th day of September, 2018.

_____
Megan McKean
Notary Public

17-1672

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AFFIDAVIT OF MAILING

WILLIAM D. LUNN, counsel for Respondent Andre Ralph Haymond, and a member of the bar of the State of Oklahoma, attests that he placed the foregoing petition for a writ of certiorari in the United States mail on September 13, 2018.

_____
WILLIAM D. LUNN

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

This affidavit of mailing subscribed and sworn to before me this September 13, 2018.

_____

Megan McKean

Notary Public

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	
vs.	CASE NO. 08-CR-201-TCK
ANDRE RALPH RAYMOND, Defendant.	

TRANSCRIPT OF PROCEEDINGS
SEPTEMBER 27, 2016
BEFORE THE HONORABLE TERENCE C. KERN, SENIOR JUDGE PRESIDING

REVOCATION SENTENCING HEARING

A P P E A R A N C E S

FOR THE PLAINTIFF:	MR. R. TRENT SHORES MR. ANDREW J. HOFLAND Asst. United States Attorneys 110 West 7th Street, Suite 300 Tulsa, OK 74119-1013
FOR THE DEFENDANT:	MR. WILLIAM DIXON LUNN Attorney at Law 320 S. Boston Suite 1130 Tulsa, OK 74103

Greg Bloxom, RMR, CRR
United States Court Reporter
Northern District of Oklahoma

PROCEEDINGS:

THE COURT: The court calls the case of United States of America vs. Andre Ralph Haymond, case number 08-CR-201. This matter comes on for sentencing.

Appearances?

MR. SHORES: Good afternoon, Your Honor. Trent Shores and Andrew Hofland on behalf of the United States.

MR. LUNN: William D. Lunn for Mr. Haymond, who's here.

THE COURT: Mr. Lunn, have you and the defendant reviewed the presentence report?

MR. LUNN: Judge, we have.

THE COURT: And did you receive it timely?

MR. LUNN: We have received it timely for purposes of this sentencing hearing, yes.

THE COURT: The court will ask the presentence report be placed in the record under seal, and direct that if any appeal is taken, counsel on appeal be permitted access to the sealed report with the exception that counsel on appeal is not to be permitted access to the recommendations section.

Are there any issues in dispute?

MR. SHORES: None from the United States, Your Honor.

MR. LUNN: Judge, with regard to the sentencing memorandum, we have obviously indicated that we think that the

statute that he's being sentenced under, which is 18, U.S.C., 3583(k), is unconstitutional, and we'd ask you to take the -- obviously a bold step to find it so and reduce his -- and strike that from the sentencing statute so that he would be only looking at a two-year maximum sentence.

THE COURT: The court finds, as its findings of fact, a grade B violation; a criminal history category of I; custody by statute not less than five years to life, under the guidelines five years pursuant to Section 7B1.4(b)(2); defendant is not eligible for probation; supervised release, by statute and under the guidelines, five years to life; the fine is satisfied; restitution is not applicable; the special mandatory assessment has been satisfied.

Any objections to the court's findings of fact?

MR. SHORES: No, Your Honor.

MR. LUNN: No.

THE COURT: All right. Mr. Lunn, remarks on behalf of the defendant? And I have reviewed your sentencing memorandum and agree that there are some matters of significance that should go to the Tenth Circuit.

You may proceed.

MR. LUNN: Judge, and I appreciate that.

When we were here last, which was actually in 2010 following Mr. Haymond's trial in the initial child pornography case, and the court sentenced him to the 38-month prison term

and then sentenced him to 10 years of supervised release thereafter, I thought at the time that 10 years was going to be a very long time for Mr. Haymond, and it didn't have anything to do with the fact that Mr. Haymond was a criminal or was inclined to do criminal things. There were two things, I think, that were important with regard to my thinking that.

The first was is that Mr. Haymond had never acknowledged that he had committed a crime in the first possession of child pornography count, and it's an issue that we took up to the Tenth Circuit. We did not get a result that we wanted. We actually took it on to the United States Supreme Court and asked -- filed a petition for cert, and it was a case that the United States Supreme Court didn't want to hear. We got a letter back probably by return mail.

So he was going to be in a position, when he got out of prison, with an infrastructure that is geared towards dealing with sex offenders where he would be saying, "I didn't ever do this." And so that was always going to be a problem for him within the structure of supervised release. So he was going to be required to go to sex therapy classes, and he was always going to say, "But I didn't do this." So that was always going to be a problem for him.

Beyond that is that Mr. Haymond himself is a nonconformist. He's the type of person -- you either like him or you don't like him, and there are a lot of people who don't like

Mr. Haymond because he's a gay American Indian and he rubs a lot of people the wrong way. And in such a structure that you get in a probation office, it was inevitable that he would rub some people the wrong way.

And we do appreciate, mind you, the efforts that have made by the probation office in this case. Certainly the first phase of this case had to do with a state officer who wanted to try to claim that Mr. Haymond hadn't filed a change of address for purposes of sex offender status, and it was because of a probation officer in the federal office that we were able to deal with that case appropriately, and there was ultimately no criminal sanction.

That being the case, we now have this situation where there are -- his cell phone has been searched and you have a situation that's really not a lot different from the situation that we had when his computer was searched in 2008. You have a batch of child pornography images, a very small batch, 59 images, that are situated in the same way they were in 2008. They're sitting in the computer's cache without any metadata around them, nothing that really puts Mr. Haymond's fingerprints on them.

And so the courts obviously struggle with this situation. And the most that I can say is that I appreciate the time that the court spent struggling with this case. And as the court correctly notes, it's a matter that we will take up to the

Tenth Circuit. We appreciate all that the court did in this regard, and we're obviously disappointed with the final result.

So my perception of Mr. Haymond is that -- and you've got a 600-page booklet of really his entire activity over two years, all of his texts, all of his -- you know, most of his e-mails, and it doesn't paint a bad picture of him.

If I were a parent of Mr. Haymond, which I'm glad I'm not, I would be exasperated in some ways. But if I were a parent of Mr. Haymond, I would say, "Let's get you in college. Let's get some of your talent channeled properly with the appropriate discipline and maybe we can make something of you."

As we're now looking at Mr. Haymond's life, he was arrested when he was only 18, he went to prison for 38 months, he's been on supervised release for close to two years when this case came up, he's been in jail for a year and he's very likely looking at a 60-month sentence. His whole life is going before him, and it's a wasted life, it's a waste of a life over these issues that courts struggle with, frankly. So we would hope that if there was any way for you to sentence him to less than 60 months, that you'd be able to do that.

We recognize that Andre Haymond didn't go to his sex treatment classes like he should have, and that he committed some minor violations, but we will always contend, and I firmly believe this, that Mr. Haymond did not know that there were

child pornography images on his smart phone, and I think the fact that he was able to take lie detector tests that covered a period of over two years should have been strong evidence that there was something else going on here and that somehow we should have dealt with it. And I hope, some way, that Mr. Haymond doesn't face the rest of his life kind of like briar rabbit with the tar baby, where he just can't ever seem to get away from it. It would be unfortunate because Mr. Haymond has talent. So, we'd ask for any kind of consideration you can give to Mr. Haymond in the way of leniency.

THE COURT: Thank you.

Mr. Haymond, any remarks you wish to make at this time on your own behalf?

THE DEPUTY COURT CLERK: He'll need to use the microphone.

THE DEFENDANT: Not at this moment, no.

THE COURT: Very well.

On behalf of the United States?

MR. SHORES: Nothing, Your Honor, other than to ask for a guideline sentence.

Thank you.

THE COURT: The court notes for the record that the defendant has filed a sentencing memorandum, docket 233, in which he states he has no objection to the calculations in the

probation officer's sentencing memorandum.

Defendant does object to the court's findings in the opinion and order dated August 2nd, 2016, docket 227, wherein the court found that the defendant committed violations 1 through 5 as alleged in the order on supervised release, docket 183, which included that the defendant committed a violation of federal law by possessing child pornography in violation of 18, U.S.C., Section 2252(a)(4)(B).

As the court has indicated, this has been a troubling case. In fact, I don't recall ever writing an opinion of any substance really on a revocation matter, certainly not a 26-page opinion, which the court has done in this case. I believe that the defendant raises an argument that should be decided by the Tenth Circuit and I hope that this case is in the proper form in order to do that.

In Mr. Lunn's brief, he indicates that it's difficult to imagine how this statute doesn't create Sixth Amendment problems under *Apprendi* and *Blakely*, and the court in its order acknowledged that and indicated that if the court were to decide this case under the standard of beyond a reasonable doubt, that the government would not have been able to bear that burden of proof. The court has decided this case as it must under revocation status based on preponderance of the evidence.

The troubling aspect of this is that there is a mandatory

sentence of 60 months' imprisonment based on a court and a revocation using a preponderance-of-the-evidence standard, and also based in a case that is difficult, it's difficult subject matter for particularly a judge who practiced law using Dictaphones and copy machines and whose children have to help him with a cell phone and the IT department with my computer.

It's repugnant to me that there is a mandatory five-year sentence in such a case where a defendant does not have the opportunity to ask for a jury or to be tried under what should be the legal standard, and that is beyond a reasonable doubt.

It's further troubling that the United States failed to call its own expert, which made this case much more difficult for the court, and demonstrates to the court either some amount of laziness or lack of concern for educating the court on matters far outside the court's normal base of knowledge.

The court doesn't, this court at least, doesn't know much about a cache or pathways or thumbnails, and we did the best that we could. But there should have been an expert on the other side of this case. It would have made all the difference in the world. And I think had the United States gone in front of a jury and presented this case, there damn sure would have been an expert called on behalf of the United States. They wouldn't have tried to rely just on cross-examination of the defendant's expert.

So, the court's considered the sentencing guidelines along

with the factors set forth in 18, U.S.C., Section 3553(a) to reach a sentence -- I don't know that it's an appropriate or reasonable sentence in the case, but I'm supposed to say that it's appropriate and reasonable. And the court has considered the defendant's five violations and the history and characteristics of the defendant.

During the course of the defendant's term of supervised release, the court found that defendant possessed child pornography and other sexually explicit images, failed to disclose to the probation office all Internet devices he possessed, failed to install monitoring software equipment and pay required monitoring fees as directed, and failed to attend required sex offender treatment counseling sessions.

Violation 1, possession of child pornography, in violation of 18, U.S.C., Section 2252(a)(4)(B), statutorily requires a term of imprisonment of at least five years pursuant to 18, U.S.C., Section 3583(k).

The court finds no factor present that warrants a sentence above the mandatory minimum. In fact, were there not this statutory minimum, the court would have looked at this as a grade B violation and probably would have sentenced in the range of two years or less. In fact, I think the probation office indicates at one point a normal grade B violation is like four to 10 months. I don't know if that would have been appropriate in this case, but it certainly would not have been

five years.

The court finds no factor -- let's see. The sentence imposed will reflect the seriousness of the violations, promote respect for the law -- I'm not sure that's even true -- and afford adequate deterrence to the defendant and others.

Given the nature and seriousness of the defendant's violations and underlying original offense, reimposition of a term of supervised release is necessary to ensure compliance with registration requirements to aid in protection of the community as well as to assist the defendant with reintegration back into the community. Now, as I have found out, that's also mandatory. I wouldn't give as much time in supervised release were I not forced to.

In accordance with applicable law -- Mr. Haymond, if you'll stand at this time -- the court hereby imposes the following sentence: It's the order and judgment of the court that the defendant, Andre Ralph Haymond, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of five years.

Upon release from imprisonment, defendant shall be placed on a term of supervised release for a period of five years as required. Immediately upon release from imprisonment, but in no event later than 72 hours, the defendant shall report in person to the probation office in the district to which the defendant is released. While on supervised releaso, defendant

shall not commit another federal, state, or local crime. Defendant is prohibited during the period of supervised release or afterward from possessing a firearm, destructive device, ammunition, or other dangerous weapon.

Further, while on supervised release, defendant shall not illegally possess a controlled substance, shall comply with the standard conditions adopted by the court, and the following additional special conditions of supervised release: Defendant shall abide by paragraphs 1 through 6, number 8 and number 9 of the special sex offender conditions.

I have a duty to advise you that you have a right to appeal the sentence that has been imposed. Any such appeal must be filed within 14 days of the date the judgment is entered. If you wish to appeal and cannot afford an appeal, there are forms in the clerk's office to request an appeal in forma pauperis, which means without any expense whatsoever.

And as I understand it, Mr. Lunn, you do intend to appeal?

MR. LUNN: Yes.

THE COURT: Very well.

Anything else on behalf of the defendant?

MR. LUNN: No, Your Honor. Thank you.

THE COURT: On behalf of the United States?

MR. SHORES: No, Your Honor. Thank you.

THE COURT: The defendant is remanded to the custody of United States Marshal.

And this court is adjourned.

(PROCEEDINGS CLOSED)

REPORTER'S CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

CERTIFIED: *s/Greg Bloxom*

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No. 17-1672

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANDRE RALPH HAYMOND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The divided decision below struck down critical portions of the sex-offense provision of the federal supervised-release statute, 18 U.S.C. 3583(k) (Supp. IV 2016), as "unconstitutional and unenforceable," Pet. App. 28a. Respondent does not dispute that the constitutionality of that provision is squarely presented for this Court's review. Nor does he dispute that this Court "commonly grants certiorari" when a lower court holds a federal statute unconstitutional, Br. in Opp. 21, even in the absence of a circuit conflict. He nevertheless suggests that this Court should hold off indefinitely, while similar constitutional challenges proliferate, before itself addressing whether its precedents in fact require Section 3583(k)'s substantial invalidation. He provides no sound reason why this Court should do so.

Respondent's primary argument for denying certiorari—that the decision below "applies well-settled constitutional law," Br. in Opp. 21—is insupportable. As

the dissenting judge recognized, that decision "jump[s] ahead of the Supreme Court when it has already spoken on this issue." Pet. App. 34a. Until the panel majority issued its ruling here, no decision of this Court or of any court of appeals had ever applied the Sixth Amendment jury-trial right to the revocation of supervised release or to any similar post-trial context. To the contrary, this Court has made clear that analogous parole-revocation proceedings are "not part of a criminal prosecution" to which the Sixth Amendment applies, *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972), and the Fourth Circuit has rejected a challenge to supervised-release revocation that was premised on arguments indistinguishable from the reasoning of the decision below, *United States* v. *Ward*, 770 F.3d 1090, 1099-1100 (2014). The panel majority's unprecedented holding both frustrates the government's ability to protect the public from recidivist sex offenders through revocation and reimprisonment under Section 3583(k)—a more common occurrence than respondent suggests—and incentivizes further challenges to the constitutionality of Congress's supervised-release scheme. Certiorari is warranted to correct the court of appeals' significant constitutional error.

A. The Decision Below Erroneously Invalidated Multiple Portions Of A Federal Statute

As explained in the petition (at 13-25), the decision below impermissibly expanded the jury-trial and related due-process rights beyond the criminal prosecutions to which they properly apply. Respondent's defense of that decision largely just recites the panel majority's reasoning verbatim, and it repeats the panel majority's errors.

Neither the court of appeals nor respondent has explained how supervised-release revocation—which occurs well after "indictment," "trial by jury," and "imposition of sentence"—can be considered part of the "criminal proceedings" to which the rights associated with a jury trial have traditionally been limited, *Apprendi* v. *New Jersey*, 530 U.S. 466, 478 & n.4 (2000). To the contrary, both respondent and the court of appeals effectively acknowledge that supervised-release revocation is *not* part of the "criminal prosecution[]" under the Sixth Amendment. U.S. Const. Amend. VI; see Br. in Opp. 15 ("[R]evocation of supervised release may not directly contemplate a 'criminal prosecution' under the terms of the Sixth Amendment."); Pet. App. 17a ("Revocation of supervised release is not part of a criminal prosecution, so defendants accused of a violation of the conditions of supervised release have no right to a jury determination of the facts constituting that violation."); see also *id.* at 19a n.1.

That should end the matter. Because supervised-release revocation—like its close analogue, parole revocation—"is not part of a criminal prosecution," the right to a jury trial with findings beyond a reasonable doubt does "not apply," *Morrissey*, 408 U.S. at 480; cf. *Minnesota* v. *Murphy*, 465 U.S. 420, 435 n.7 (1984) (explaining that "there is no right to a jury trial" before revocation of probation). The cases on which respondent and the court of appeals principally rely (Br. in Opp. 15-18)—*Apprendi*, *supra*; *United States* v. *Booker*, 543 U.S. 220 (2005); and *Alleyne* v. *United States*, 570 U.S. 99 (2013)—all arose from *initial* sentencing proceedings, not from revocation proceedings. See Pet. App. 15a-21a. Revocation of supervised release, like revocation of pa-

role, is part of the *implementation* of a previously imposed sentence, not the imposition of a new one. See 18 U.S.C. 3583(a), (e), and (k); *Johnson* v. *United States*, 529 U.S. 694, 701 (2000). And the Court has made clear that *Apprendi* and its progeny do not apply to proceedings in which "the jury traditionally played no part," *Oregon* v. *Ice*, 555 U.S. 160, 163 (2009), as is undisputedly the case with proceedings like these, see Pet. 17-19.

Respondent offers no solution to the logical problems inherent in the court of appeals' decision. He adopts the panel majority's view that Section 3582(k) imposes "punishment for commission of a *new* designated offense," Br. in Opp. 16 (emphasis added) (citing Pet. App. 21a), but fails to reconcile that view with this Court's determination that "postrevocation penalties" for violations of supervised release are "attribute[d] * * * to the *original* conviction," *Johnson*, 529 U.S. at 701 (emphasis added). He likewise fails meaningfully to distinguish Section 3583(k) from other provisions of the supervised-release statute that he and the court of appeals appear to accept as constitutional. He has no quarrel with the court of appeals' view that his supervised release can be revoked, and a term of imprisonment ordered, based on a judicial finding by a preponderance of the evidence under 18 U.S.C. 3583(e). See Pet. App. 28a (remanding for such a proceeding). But if that revocation and reimprisonment is constitutional, then similar revocation and reimprisonment under Section 3853(k) should be as well. See Pet. 23-25; Pet. App. 33a (Kelly, J., concurring in part and dissenting in part).

Nor does respondent provide any valid basis for the court of appeals' choice of remedy for the constitutional violation it perceived. See Pet. 25-27. He briefly suggests (Br. in Opp. 19-20) that invalidating Section 3583(k),

rather than simply requiring the jury findings that the court believed the Constitution demanded, was analogous to this Court's determination in *Booker* to render the federal Sentencing Guidelines advisory rather than mandatory. But the court of appeals' remedy here, unlike the remedy in *Booker*, does not allow for the effectuation of Congress's directive even in modified form. It instead strikes down that directive altogether. A remedy that still allowed for revocation and reimprisonment in accord with the terms of Section 3583(k), but with heightened procedural requirements, would necessarily be more consistent with "legislative intent," *Booker*, 543 U.S. at 246, than the panel majority's far more disruptive remedy of wholesale judicial nullification.

B. This Court's Review Is Warranted

As the petition explains (at 27-32), the anomalous invalidation of important federal statutory provisions presents a straightforward and compelling basis for granting certiorari. Respondent fails to justify his suggestion that this Court, in a departure from its typical practice, should nevertheless allow the decision below to stand unreviewed.

1. As respondent acknowledges (Br. in Opp. 21), this Court often grants certiorari "in light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional," *United States* v. *Kebodeaux*, 570 U.S. 387, 391 (2013); see also, *e.g.*, *United States* v. *Morrison*, 529 U.S. 598, 605 (2000) ("Because the Court of Appeals invalidated a federal statute on constitutional grounds, [the Court] granted certiorari."). Respectful of the effect of such a circuit decision on the coordinate Branches, this Court does not require a circuit conflict as a prerequisite for its own intervention. See Pet. 27 (citing cases).

Aside from his misplaced assertion (Br. in Opp. 21) that the decision below simply "applies well-settled constitutional law," respondent proffers little support for his suggestion that the Court sit back while Congress's supervised-release scheme is hampered and the government is forced to fend off challenges to Congress's enactment in other courts. Respondent cites a handful of cases in which this Court has declined to grant review of lower-court decisions invalidating federal statutes. *Id.* at 21-22. But the cited cases are not comparable to this one. For example, in *American Civil Liberties Union* v. *Mukasey*, 534 F.3d 181 (3d Cir. 2008), cert. denied, 555 U.S. 1137 (2009), this Court had already held in an earlier stage of the litigation that the statute likely violated the First Amendment, see *Ashcroft* v. *American Civil Liberties Union*, 542 U.S. 656, 660-661 (2004), and may well have concluded that the matter was adequately addressed in its prior opinion. The decision in *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998), was highly fact-bound and rested on the government's failure to introduce sufficient factual evidence that the federal ban on broadcast advertisement of casino gambling advanced substantial government interests. *Id.* at 1336. And, as respondent appears to recognize, the Solicitor General did not seek certiorari in either *ACORN* v. *Edwards*, 81 F.3d 1387 (5th Cir. 1996), cert. denied, 521 U.S. 1129 (1997), which arose in an unusual attorneys' fees posture, or *Wilson* v. *NLRB*, 920 F.2d 1282 (6th Cir. 1990), cert. denied, 505 U.S. 1218 (1992), in which a private party had unsuccessfully challenged an NLRB decision.

Here, in contrast, the constitutional question is squarely presented. Respondent identifies no vehicle problems or procedural bases for denying review. Nor

does he provide any sound reason why further percolation in the circuits might be necessary. Although no other court of appeals has published a decision squarely addressing the constitutionality of the portions of Section 3583(k) at issue here, courts of appeals addressing the broader question whether the rights to a jury trial and factual findings beyond a reasonable doubt apply to revocations of supervised release and subsequent orders of reimprisonment have uniformly agreed that they do not. Pet. 29-31 (collecting cases). And the Fourth Circuit in *United States* v. *Ward*, *supra*, rejected a Sixth Amendment challenge to a since-repealed provision (18 U.S.C. 3583(g) (1988)) that, like current Section 3583(k), mandated revocation of supervised release and reimprisonment for a minimum period of time based on judicial findings of fact. See Pet. 31-32. Respondent does not cite, much less distinguish, that decision, which rests on reasoning irreconcilable with the rationale of the divided decision below.

Respondent appears to recognize (Br. in Opp. 21) that the question presented in this case *would* warrant review once some (undefined) number of additional courts of appeals have directly addressed it. No justification exists for requiring the government to litigate the issue indefinitely before this Court weighs in. The government has already addressed a similar challenge (in a plain-error posture) in the Ninth Circuit, see *United States* v. *Sperling*, 699 Fed. Appx. 636, 637 (2017), petition for cert. pending, No. 17-8390 (filed Mar. 28, 2018); another challenge is before the Seventh Circuit, *United States* v. *Hollman*, appeal pending, No. 18-1874 (oral argument scheduled for Sept. 28, 2018); and yet another is before the Eleventh Circuit, which has stayed proceedings pending this Court's resolution of this petition, see

Order, *United States* v. *Carpenter*, No. 17-15683 (July 18, 2018). Litigants have also relied on the decision below to attack Section 3583(k) on other grounds. See, *e.g.*, *United States* v. *Wilson*, No. 17-cr-539, 2018 WL 3159085 (E.D. Mo. June 28, 2018) (rejecting Double Jeopardy Clause challenge), appeal pending, No. 18-2591 (8th Cir. filed July 26, 2018). These and other cases will inevitably result in either a square circuit conflict or further erroneous invalidation of a federal statute. This Court should act expeditiously to restore clarity.

2. As the pendency of the aforementioned cases—which may only be the tip of the iceberg—makes clear, respondent errs in suggesting (Br. in Opp. 22) that Section 3583(k) is "seldom used." He supports that assertion only with a citation to Sentencing Commission data that do not, in fact, track the number of supervised-release revocations under Section 3583(k). See U.S. Sentencing Comm'n, *Commission Datafiles*, https://www.ussc.gov/research/datafiles/commission-datafiles#individual (collecting data on various other sentencing matters). The government is not aware of any statistics on exactly how often Section 3583(k) is applied in the revocation of supervised release, but the government's experience is that it occurs with some frequency. See Pet. 29. And it will likely occur with increasing frequency in the future, given the large number of sex offenders on supervised release and the long terms of supervised release many are serving.

In any event, this Court has granted certiorari when lower courts have struck down federal statutes that are not applied with great frequency. See, *e.g.*, *United States* v. *Alvarez*, 567 U.S. 709 (2012); *United States* v. *Stevens*, 559 U.S. 460 (2010). And certiorari is especially appropriate here because the decision below invalidated a

statute designed to protect the public against the serious dangers created by sex offenders. See *Kebodeaux*, 570 U.S. at 395. As noted in the petition (Pet. 27-28), this Court has granted review in a number of cases in which lower courts held unconstitutional provisions of statutes designed to serve that purpose, including in two cases involving provisions of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587—the same statute at issue in this case. See *Kebodeaux*, 570 U.S. at 395; *United States* v. *Comstock*, 560 U.S. 126, 149-150 (2010). Review is similarly warranted here.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

SEPTEMBER 2018

No. 17-1672

In the Supreme Court of the United States

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v.

ANDRE RALPH HAYMOND

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals erred in holding "unconstitutional and unenforceable" the portions of 18 U.S.C. 3583(k) that required the district court to revoke respondent's ten-year term of supervised release that was imposed for his conviction for possessing child pornography, and to impose five years of reimprisonment, following its finding by a preponderance of the evidence that respondent violated the conditions of his release by again possessing child pornography.

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In the Supreme Court of the United States

No. 17-1672

UNITED STATES OF AMERICA, PETITIONER

v.

ANDRE RALPH HAYMOND

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 869 F.3d 1153. A prior opinion of the court of appeals is reported at 672 F.3d 948. The opinion of the district court (Pet. App. 35a-69a) is not published in the Federal Supplement but is available at 2016 WL 4094886.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2017. A petition for rehearing was denied on January 16, 2018 (Pet. App. 70a). On April 4, 2018, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including May 16, 2018. On May 3, 2018, Justice Sotomayor further extended the time to and including June 15, 2018, and the petition was filed on that date. The petition was granted on October 26, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Section 3583(k) of Title 18 provides:

> Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

18 U.S.C. 3583(k) (Supp. V 2017).[1]

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[1] Unless otherwise indicated, all references to 18 U.S.C. 3583 and other federal statutes are to the 2012 edition of the United States Code, with amendments contained in the 2017 Supplement V. The current versions of those statutes are identical in all material respects to the versions in force at the time of respondent's sentencing.

Other pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Oklahoma, respondent was convicted on one count of possession and attempted possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Pet. App. 2a. The district court sentenced him to 38 months of imprisonment, to be followed by ten years of supervised release. *Ibid.* The court of appeals affirmed, 672 F.3d 948, and this Court denied review, 567 U.S. 923. The district court subsequently revoked respondent's supervised release and ordered five years of reimprisonment, to be followed by five years of supervised release. Pet. App. 35a-69a. The court of appeals affirmed the revocation of supervised release but vacated the order of reimprisonment and remanded. *Id.* at 1a-28a.

A. Respondent's Offense Conduct And Jury Trial

In 2007, an undercover federal agent "caught [respondent] sharing child pornography files on * * * a peer-to-peer sharing network." Pet. App. 37a. Agents subsequently "located seventy files containing child pornography" on respondent's computer. *Ibid.* Respondent, who was studying computer programming at a local community college, "admitted" that he was "addicted to child pornography"; that he "had been accessing child pornography since 2006"; that he "searched the Internet regularly for child pornography"; and that he "deleted the images after he viewed them by reformatting his hard drive and reinstalling his Windows operating system." *Ibid.*; see 672 F.3d at 956 (noting that

respondent "admitted to frequently searching for and downloading child pornography").

A grand jury indicted respondent for possession and attempted possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). See 672 F.3d at 951. Respondent proceeded to trial. The government selected seven sexually explicit images of children found on respondent's computer as the basis for its case at trial. *Ibid.* A federal agent testified that the "seven charged images are part of a larger series of photographs" known to the National Center for Missing and Exploited Children "as the 'Brad and Bry' series." *Id.* at 953. The images depict sexually explicit conduct involving boys who were "between twelve and fourteen years old when the photos were taken." *Ibid.* The jury found respondent guilty. Pet. App. 37a.

B. Respondent's Sentence

Respondent's conviction following a jury trial exposed him to a sentence containing multiple component parts: under 18 U.S.C. 2252(b)(2), respondent could "be fined * * * or imprisoned not more than 10 years, or both," and under 18 U.S.C. 3583(k), the district court was required to impose a supervised-release term of at least five years. The district court imposed a sentence of 38 months of imprisonment, to be followed by ten years of supervised release. Pet. App. 37a. The supervised-release portion of the sentence, as explained further below, was subject to "numerous conditions," the violation of which could result in reimprisonment. *Ibid.*

1. Imposition of supervised release

Established by Congress in 1984, supervised release is the principal "form of postconfinement monitoring" for defendants who are convicted of federal crimes.

Johnson v. *United States*, 529 U.S. 694, 697 (2000). Like the federal parole system it replaced, supervised release provides defendants with a form of conditional liberty by allowing them to provisionally serve "part of the[ir] sentence" out of prison, subject to revocation and reimprisonment if they violate the conditions of their release. 18 U.S.C. 3583(a); see *Johnson*, 529 U.S. at 711.

A district court generally has discretion both as to whether to impose a term of supervised release and as to the length of the term it imposes, within limits corresponding to the severity of the offense of conviction. 18 U.S.C. 3583(a) and (b); see Sentencing Guidelines §§ 5D1.1, 5D1.2. In making those determinations, courts must consider the same factors that govern imposition of the other parts of a sentence, see 18 U.S.C. 3553(a), except for the need for the sentence to provide "just punishment," 18 U.S.C. 3553(a)(2)(A); see 18 U.S.C. 3583(c).

In some cases, a term of supervised release "is required by statute," and a court "shall" impose it. 18 U.S.C. 3583(a). For example, a court is required by statute to impose terms of supervised release for certain domestic-violence, terrorism, and drug-trafficking crimes. See 18 U.S.C. 3583(a) and (j), 21 U.S.C. 841(b), 960(b). Some statutes require courts to impose a minimum term of supervised release. See, *e.g.*, 21 U.S.C. 841(b), 960(b) (requiring a minimum term of five years for certain drug-trafficking crimes). And some statutes authorize terms of supervised release up to life. See, *e.g.*, *ibid.*; 18 U.S.C. 3583(j) (authorizing life term for certain terrorism offenses).

Of central relevance here, 18 U.S.C. 3583(k) requires a district court to impose a term of supervised release of five years to life for conviction of certain specified

kidnapping or sex offenses—primarily, offenses that victimize minors—including the child-pornography offense for which respondent was convicted.[2] Congress added that requirement as part of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, Tit. I, § 101, 117 Stat. 651-652. The requirement reflects the shared judgment of Congress and the Executive Branch that many sex offenders have "deep-seated aberrant sexual disorders" that require "long-term—and in some cases, lifelong—monitoring and oversight" to protect the public. H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 49-50 (2003); see George W. Bush, *Remarks on Signing the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003*, 1 Pub. Papers 398 (Apr. 30, 2003) ("This law carries forward a fundamental responsibility of public officials at every level of government to do everything we can to protect the most vulnerable citizens from dangerous offenders who prey on them."); see also

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[2] Specifically, Section 3583(k) requires supervised release for an offense under 18 U.S.C. 1201 (kidnapping) involving a minor victim, and for any offense under Sections 1591 (sex trafficking of children or by force, fraud, or coercion), 1594(c) (conspiracy to commit sex trafficking of children or by force, fraud, or coercion), 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2243 (sexual abuse of a minor or ward), 2244 (abusive sexual contact), 2245 (murder during the commission of certain sex crimes), 2250 (failure to register as a sex offender), 2251 (sexual exploitation of children), 2251A (selling or buying of children), 2252 (child pornography), 2252A (child pornography), 2260 (extraterritorial child pornography), 2421 (transportation of an individual with intent that the individual engage in prostitution or sex crimes), 2422 (coercion and enticement), 2423 (transportation and travel offenses involving child sex crimes), or 2425 (transmission of information about a minor to entice a sex crime).

Sentencing Guidelines § 5D1.2(b) (recommending the "statutory maximum term of supervised release" when "the instant offense of conviction is a sex offense").

The district court in respondent's case imposed a ten-year, rather than the statutory-minimum five-year, term of supervised release as part of the sentence for his child-pornography conviction. Pet. App. 2a. The court explained that a "ten-year term of supervised release is appropriate based on the nature of the offense and [respondent's] need for treatment and monitoring." 6/10/10 Sent. Tr. 49.

2. Conditions of supervised release

When a court orders supervised release, it also specifies conditions for that release, 18 U.S.C. 3583(d), the violation of which may result in the revocation of supervised release and reimprisonment, see, *e.g.*, 18 U.S.C. 3583(e)(3). Among other mandatory conditions, every sentence including a term of supervised release must order, "as an explicit condition," that "the defendant not commit another Federal, State, or local crime during the term of supervision" and that the defendant "not unlawfully possess a controlled substance." 18 U.S.C. 3583(d). Respondent's child-pornography offense triggered a further requirement that the court "order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act [(SORNA) 34 U.S.C. 20901 *et seq.* (formerly codified at 42 U.S.C. 16901 *et seq.*)] that the person comply with the requirements of that Act." *Ibid.*; see 34 U.S.C. 20911(1) and (5)(A)(iii), 20913(a).

A sentencing court may also impose "any other condition it considers to be appropriate," including "any condition set forth as a discretionary condition of pro-

bation in" 18 U.S.C. 3563(b), so long as the condition satisfies certain statutory limitations. 18 U.S.C. 3583(d); see Sentencing Guidelines § 5D1.3. In the case of a defendant who, like respondent, "is a felon and required to register under" SORNA, the court may order "that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant," by a "probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person." 18 U.S.C. 3583(d); see Sentencing Guidelines § 5D1.3(d)(7) (outlining advisory conditions for sex offenders).

The district court in respondent's case specified that his supervised release would be subject to "numerous conditions." Pet. App. 37a. In addition to the statutorily mandated conditions that respondent not commit another federal, state, or local crime and register as a sex offender under SORNA, the court required respondent to, *inter alia*, participate in sex-offender and mental-health treatment, refrain from unapproved contact with children, "not view or possess any materials * * * depicting and/or describing sexually explicit conduct or child pornography," disclose all internet devices and passwords, install and pay for software allowing monitoring of his computer activity, and submit to searches by his probation officer under terms similar to those described above, 1 C.A. App. 31-32.

In imposing the sentence, the district court read the conditions of supervised release to respondent on the record. 2 C.A. App. 201. Respondent subsequently

"signed those conditions," 3 C.A. App. 38, and acknowledged that he was aware of the consequences for violating them, 2 C.A. App. 184, 214.

3. Consequences for violating the conditions of supervised release

When a defendant completes a prison term and is released back into society, his supervised release is "overseen by the sentencing court," *Johnson*, 529 U.S. at 697, with the Probation Office (an arm of the court) monitoring the defendant's compliance with the supervised-release conditions, 18 U.S.C. 3603(1)-(4); see 18 U.S.C. 3602. Although probation officers work "to aid * * * a person on supervised release" and "to bring about improvements in his conduct and condition," 18 U.S.C. 3603(3), it is inherent in the conditional nature of supervised release that some defendants will "tr[y] liberty and fail[]," *Johnson*, 529 U.S. at 709.

Where a defendant proves to be a "problem case among problem cases," *Johnson*, 529 U.S. at 709, the violation of his supervised-release conditions will result in reimprisonment, which may be followed by further supervised release, see United States Sentencing Comm'n, *Federal Offenders Sentenced to Supervised Release* 4 (July 2010) (noting that one-third of defendants sentenced to supervised release "had their terms revoked and were sent back to prison"). In *Johnson* v. *United States*, *supra*, this Court addressed "postrevocation penalties" following supervised-release violations and explained that they are not punishments for the violations themselves, but are instead attributable "to the original conviction," thereby "avoid[ing]" constitutional difficulties that would have arisen under the former interpretation. 529 U.S. at 700-701.

Under 18 U.S.C. 3583(e)(3), a district court may "revoke a term of supervised release" if the court, pursuant to Federal Rule of Criminal Procedure 32.1, "finds by a preponderance of the evidence that the defendant violated a condition of supervised release." 18 U.S.C. 3583(e)(3). If the court revokes supervised release, it generally may "require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision." *Ibid.* The court generally may also require further supervised release after the reimprisonment, subject to certain statutorily specified limits. 18 U.S.C. 3583(h).

In considering whether to revoke supervised release and impose reimprisonment or additional supervised release, courts consider the original offense of conviction along with the nature of the supervised-release violation. Sentencing Guidelines §§ 7B1.3, 7B1.4. Section 3583(e)(3)'s authorization of a term of imprisonment contains an "except[ion]" that sets default limits on the length of reimprisonment, keyed to the defendant's underlying offense of conviction. 18 U.S.C. 3583(e)(3). For example, under Section 3583(e)(3), a defendant convicted of a class C felony "may not be required to serve * * * more than 2 years in prison" for a supervised-release violation. *Ibid.*

Just as some statutes mandate particular terms of supervised release for certain offenses, see p. 5, *supra*, some statutes mandate revocation of supervised release and reimprisonment if the defendant commits certain supervised-release violations. For example, 18 U.S.C. 3583(g) requires a court to revoke the supervised release and order the reimprisonment of a defendant for

certain violations including possession of a controlled substance or a firearm, refusal to comply with drug testing, or testing positive for illegal controlled substances more than three times in one year.

As pertinent here, Section 3583(k) specifies that a district court will revoke supervised release if a defendant who is required to register under SORNA "commits a[] criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591 [of Title 18], for which imprisonment for a term longer than 1 year can be imposed"—a category of crimes that includes numerous sex offenses involving children. 18 U.S.C. 3583(k). Section 3583(k) further specifies that the district court will require the defendant "to serve a term of imprisonment" that "shall be not less than 5 years," *ibid.*, "without regard to the exception" in Section 3583(e)(3) that would otherwise bear on the length of reimprisonment, *ibid.* Congress added both of those provisions of Section 3583(k) in the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. No. 109-248, § 141(e)(2), 120 Stat. 603, which it passed to "protect the public from sex offenders and offenders against children," § 102, 120 Stat. 590; see George W. Bush, *Remarks on Signing the Adam Walsh Child Protection and Safety Act of 2006*, 2 Pub. Papers 1453 (July 27, 2006) (observing that the Adam Walsh Act furthers "a duty to protect our children from exploitation and danger").

In appealing the final judgment entered after his conviction and sentencing, respondent did not challenge the imposition of supervised release under Section 3583(k), the conditions of his supervised release, or any other aspect of his sentence. See 672 F.3d at 953.

C. Respondent's Reimprisonment For Violating The Conditions Of His Supervised Release

Respondent completed his prison term and began his supervised release on April 24, 2013, under the monitoring of a probation officer. Pet. App. 38a. Less than a year later, respondent was indicted in a separate case for failure to register as a sex offender. *Ibid.*; see 18 U.S.C. 2250 (2012). Respondent resolved that charge through a deferred-prosecution agreement. Pet. App. 38a. The Probation Office did not ask the district court to revoke his supervised release at that time.

In January 2015, a new probation officer began monitoring respondent. Pet. App. 38a. She observed that respondent had violated his supervised-release conditions in a number of ways, including failure to attend a number of the sex-offender treatment sessions, "uninstall[ing] monitoring software from his personal computer," "not stay[ing] current on his monitoring software payments," and "fail[ing] to keep installation appointments with the software company." *Ibid.* The officer gave respondent "a strict deadline for compliance" with the computer-monitoring condition, "which he did not meet." *Ibid.* Instead, respondent "bragged * * * that he could outsmart the monitoring software." *Ibid.* Probation officers then conducted a search of respondent's apartment, where they found computers that he had failed to report and a mobile phone that contained images of both adult and child pornography in its memory cache. *Id.* at 37a-45a.

Respondent's probation officer reported to the district court that respondent had committed five violations of his supervised-release conditions: (1) possession of 59 images of child pornography, in violation of the mandatory condition that respondent not commit

another federal, state, or local crime; (2) failure to disclose to the probation office all internet devices respondent possessed, in violation of a special computer restriction; (3) possession of numerous sexually explicit images on his phone, in violation of a special condition that respondent not view or possess pornography; (4) failure to install and pay for computer monitoring software, in violation of a special monitoring condition; and (5) failure to attend sex-offender treatment on 15 occasions, in violation of a special condition that he participate in treatment. Pet. App. 3a; see 1 C.A. App. 36-39.

The district court held an evidentiary hearing on those allegations. See Pet. App. 36a. Respondent was represented by counsel, called an expert witness, presented and cross-examined lay witnesses, and testified before the court. *Ibid.*; see Fed. R. Crim. P. 32.1; 2 C.A. App. 27-225 (revocation hearing transcript). The court found by a preponderance of the evidence that respondent committed each of the charged violations of his supervised-release conditions, although it attributed to him only 13 of the images of child pornography in his phone's cache. Pet. App. 3a, 45a-46a. Of particular relevance here, the court found by a preponderance of the evidence (but explicitly did not find beyond a reasonable doubt) that respondent had violated his supervised-release conditions by knowingly possessing 13 images of child pornography in violation of Section 2252(a)(4)(B). *Id.* at 3a, 45a-68a.

Because respondent was required to register as a sex offender under SORNA and violated the conditions of his supervised release by committing a "criminal offense under chapter" 110 of Title 18 "for which imprisonment for a term longer than 1 year can be imposed,"

18 U.S.C. 3583(k)—namely, knowing possession of child pornography in violation of 18 U.S.C. 2252(a)(4)(B)—the court was required by Section 3583(k) to revoke respondent's supervised release and order him reimprisoned for "not less than 5 years," 18 U.S.C. 3583(k); see Pet. App. 68a. Finding "no factor present that warrant[ed]" a longer period of reimprisonment, 3 C.A. App. 152, the court ordered respondent to return to prison for five years, after which he would serve five years on supervised release, *id.* at 153; see 18 U.S.C. 3583(h).[3]

D. Respondent's Appeal Of His Supervised-Release Revocation And Reimprisonment

The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-28a. The court unanimously rejected respondent's challenge to the sufficiency of the evidence that he knowingly possessed child pornography (although it viewed the case to be "close"), and it affirmed the district court's revocation of his supervised release. *Id.* at 4a-10a, 28a; see *id.* at 29a-31a (Kelly, J., concurring in part and dissenting in part). But a majority of the panel concluded that the case should be remanded for further proceedings in which only Section 3583(e)(3), and not Section 3583(k), would apply to the district court's imposition of consequences for the supervised-release violation. *Id.* at 28a. The majority excised, as "unconstitutional and unenforceable," the final two sentences of Section 3583(k), which require revocation of supervised release and reimprisonment

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[3] The district court noted its "serious concerns about" the requirement that respondent return to prison for at least five years after a revocation decision made "without a jury," but did not address any constitutional questions. Pet. App. 50a-51a.

for at least five years on a finding that a particular type of defendant has violated supervised release by committing conduct corresponding to certain listed crimes. *Ibid.*; see *id.* at 26a-28a.

1. In the majority's view, Section 3583(k) "violates the Fifth and Sixth Amendments" for two reasons: "(1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range," and "(2) it imposes heightened punishment on sex offenders expressly based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt." Pet. App. 15a.

As to the first rationale, the court of appeals recognized that "[r]evocation of supervised release is not part of a criminal prosecution, so defendants accused of a violation of the conditions of supervised release have no right to a jury determination of the facts constituting that violation." Pet. App. 17a (citing *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972)). The majority also recognized that this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Alleyne* v. *United States*, 570 U.S. 99 (2013)—which hold that any fact other than a prior conviction "that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt," Pet. App. 15a-16a (quoting *Alleyne*, 570 U.S. at 103)—apply only to "the criminal prosecution" and not to the revocation of supervised release, *id.* at 17a.

The court of appeals concluded, however, that Section 3583(k) "violates the Sixth Amendment" under *United States* v. *Booker*, 543 U.S. 220 (2005), which applied *Apprendi* to the federal Sentencing Guidelines.

Pet. App. 21a. The majority reasoned that "[b]y requiring a mandatory term of reimprisonment, 18 U.S.C. § 3583(k) increases the minimum sentence to which a defendant may be subjected." *Id.* at 20a. The majority noted that "when [respondent] was originally convicted by a jury, the sentencing judge was authorized to impose a term of imprisonment between zero and ten years." *Ibid.* (citing 18 U.S.C. 2252(b)(2)). The court further noted that "[a]fter the judge found, by a preponderance of the evidence" that respondent had violated a condition of his supervised release, Section 3583(k) required respondent to serve "a term of reincarceration of at least five years." *Ibid.* In the majority's view, "[t]his unquestionably increased the mandatory minimum sentence of incarceration to which [respondent] was exposed from no years to five years," thereby "chang[ing] his statutorily prescribed sentencing range" without a jury finding beyond a reasonable doubt. *Id.* at 20a-21a (footnote omitted).

As to the second rationale for its constitutional holding, the court of appeals did not dispute that "committing any crime" in violation of supervised-release conditions imposed following conviction of a class C felony like respondent's could permissibly result in respondent's reimprisonment for up to two years under Section 3583(e)(3). Pet. App. 22a. But the court took the view that Section 3853(k) "impermissibly requires a term of imprisonment based * * * on the commission of a new offense—namely 'any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed.'" *Ibid.* (quoting 18 U.S.C. 3583(k)). The majority reasoned that "[b]y separating [certain] crimes from

other violations, § 3583(k) imposes a heightened penalty" that does not depend on the original offense, and "must be viewed, at least in part, as" imposing "punishment for the subsequent conduct" rather than the original offense. *Id.* at 23a. Viewed in that manner, the court concluded, Section 3583(k) invites the constitutional concerns that this Court avoided in *Johnson* by contruing supervised-release revocation as punishment for the original offense. *Id.* at 21a-22a.

Turning to "the appropriate remedy" to address the constitutional violation it perceived, the majority recognized that it "must 'refrain from invalidating more of the statute than is necessary.'" Pet. App. 26a (quoting *Booker*, 543 U.S. at 258). The majority determined that "the remaining provisions of § 3583, and of the sentencing code, 18 U.S.C. §§ 3551-3586," could "function independently" of the two sentences of Section 3583(k) that required revocation of supervised release and reimprisonment for five years upon finding certain supervised-release violations. *Id.* at 27a-28a. But without analyzing whether those two sentences could themselves be enforced in a constitutional manner, the court declared them to be "unconstitutional and unenforceable." *Id.* at 27a-28a.

2. Judge Kelly dissented from the majority's invalidation of the second and third sentences of Section 3583(k), warning against "jump[ing] ahead of the Supreme Court when it has already spoken on this issue." Pet. App. 34a; see *id.* at 31a-34a.

Judge Kelly "disagree[d]" with the conclusion, underlying the majority's first rationale for its constitutional holding, that *Booker* "applies to revocation proceedings." Pet. App. 31a. He observed that respondent "was tried and found guilty beyond a reasonable doubt

of the original offense"; that "those jury-found facts supported the sentence imposed"; that *Booker* had "applied to that sentence"; and that respondent had been "instructed that supervised release would be part of that sentence and that there were certain restrictions he had to abide by lest his supervised release be revoked." *Ibid.* "That the full panoply of rights were guaranteed to [respondent] during his initial criminal proceeding," Judge Kelly explained, "does not mean that they attach once more during a revocation proceeding," which "is neither part of th[e] criminal prosecution nor is it a new criminal prosecution." *Id.* at 31a-32a; see *id.* at 31a (citing *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973)). Judge Kelly found the majority's view that *Booker* would apply to such a proceeding, even though *Apprendi* and *Alleyne* would not, to be "hard to understand * * * under current precedent." *Id.* at 32a.

Judge Kelly additionally observed that this Court "answered the [majority's] second objection to" Section 3583(k) by holding in *Johnson* that "revocation of supervised release is not 'punishment for the violation of the conditions of supervised release.'" Pet. App. 32a (citation omitted). He accordingly criticized the majority for "fail[ing] to take the Supreme Court at its word." *Ibid.* And he explained that "under the 'breach of trust' theory applicable to the revocation of supervised release," wherein "'the nature of the conduct leading to the revocation [can] be considered in measuring the extent of the breach of trust,'" Congress "can determine that the commission of certain crimes constitutes a more serious breach of trust warranting a longer term of revocation." *Id.* at 33a (quoting Sentencing Guidelines Ch. 7, Pt. A, intro. 3(b) (2016) (brackets in original)). He accordingly would have affirmed the district

court's reimprisonment of respondent for five years. *Id.* at 34a.

SUMMARY OF ARGUMENT

The court of appeals erred in striking down the provisions of Section 3583(k) that required the district court to revoke respondent's supervised release and order his reimprisonment. The jury-trial right, which is guaranteed in "all criminal prosecutions," U.S. Const. Amend. VI, did not apply to the proceedings below, which occurred long after respondent's criminal prosecution had ended and concerned sentence-implementation facts that did not exist when the criminal prosecution occurred. This Court has repeatedly countenanced analogous sentence-administration proceedings in which a defendant's conditional liberty may be revoked based on a judicial—or even executive—factual determination, without requiring a jury finding beyond a reasonable doubt. And even if such a finding were required, Section 3583(k) would not be "unconstitutional and unenforceable." Pet. App. 27a-28a.

I. This Court's decisions construing the jury-trial right draw a line between facts relevant to the imposition of a sentence, to which the right may apply, and those relevant to the administration of a sentence, to which the right does not apply. A "criminal prosecution" was historically understood to end when the sentence was imposed and final judgment was entered. Consistent with that understanding, this Court has recognized that the Sixth Amendment does not apply to parole-revocation proceedings, see *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972), probation-revocation proceedings, see *Gagnon* v. *Scarpelli*, 411 U.S. 778, 781 (1973), or proceedings concerning the accrual of credits that will shorten a term of imprisonment, see *Wolff* v.

McDonnell, 418 U.S. 539, 556-557 (1974). Although each of those proceedings implicates the defendant's liberty—through the possibility of new, renewed, or lengthened imprisonment—the Court has consistently held that previously convicted defendants have only limited due-process rights in such sentence-administration contexts. Those rights have not included the right to a jury finding beyond a reasonable doubt.

This Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, likewise reflect the historical understanding of a "criminal prosecution" as the trial for a criminal offense culminating in the imposition of a sentence, not the implementation of a previously imposed sentence. Those decisions recognize that any fact, other than the fact of a prior conviction, that increases the sentencing range applicable when the judge *imposes* a sentence must be charged in an indictment and found beyond a reasonable doubt by the jury (or admitted in a plea). But this Court's precedents do not suggest that postjudgment facts—which do not even exist at the time of the indictment or sentencing—are subject to a similar requirement. The "animating principle" of the *Apprendi* rule "is the preservation of the jury's historic role as a bulwark between the State and the accused *at the trial for an alleged offense*," *Oregon* v. *Ice*, 555 U.S. 160, 168 (2009) (emphasis added), and a postsentencing jury would be historically anomalous. The history of probation and parole illustrates that juries have traditionally played no part in determining facts about a defendant's compliance with the terms under which he has been allowed conditional liberty, even when such facts are prerequisites for imprisonment.

The district court was accordingly not required to convene a jury in order to revoke respondent's supervised release and order his reimprisonment based on his violation of his supervised-release conditions. Like parole—its direct precursor and close analogue—and probation, supervised release is a system of conditional liberty in which a defendant is subject to imprisonment for noncompliance with the requirements that the court has ordered. Nothing in logic, history, or precedent required the insertion of a jury into the court's supervisory determination that respondent, previously sentenced to a ten-year term of supervised release, violated the release conditions and should be reimprisoned for five years as required by Section 3583(k). Indeed, this Court in *Johnson* v. *United States*, 529 U.S. 694 (2000), appeared to view revocation of supervised release and reimprisonment based on judicial factfinding by a preponderance of the evidence to be a constitutionally unproblematic consequence of a defendant's original conviction. And until the decision below, every court of appeals that had addressed the question—including the Tenth Circuit itself—had recognized that the Sixth Amendment does not apply to the revocation of supervised release and resulting reimprisonment.

The majority below erred in concluding otherwise. Its view that a decision premised on the Sixth Amendment, *United States* v. *Booker*, 543 U.S. 220 (2005), applies here, even if the Sixth Amendment itself does not, is untenable. And its view that Section 3583(k) imposes penalties for a new criminal offense is at odds both with *Johnson*, which attributed revocation of supervised release to the original offense of conviction, and with its own recognition that a defendant's supervised release *can* be revoked based on a judicial factfinding of a

supervised-release violation that matches the definition of a crime. Congress was entitled to identify certain types of supervised-release violations following convictions of certain offenses—such as respondent's possession of child pornography while on supervised release for possessing child pornography—as particularly serious breaches of trust that require lengthy reimprisonment. In doing so, it did not create new "criminal prosecutions" subject to the Sixth Amendment.

II. The court of appeals compounded the errors in its constitutional analysis by ordering an inappropriate remedy. Even if the jury-trial right applied to supervised-release revocation proceedings, the court below had no sound basis for declaring the challenged provisions of Section 3583(k) facially unconstitutional and therefore "unenforceable." Pet. App. 26a, 28a. As this Court's previous decisions illustrate, the appropriate remedy for a violation of the right to have a jury find particular facts is to require a jury to find those facts. Nothing in Section 3583(k) precludes that tailored remedy, which would satisfy the constitutional entitlement perceived by the court below while still effectuating Congress's efforts to ensure suitable lengths of imprisonment for sex offenders who present heightened risks of recidivism and endanger children. Thus, in the event this Court declines to reverse the decision below on the merits, it should reverse on the separate ground that the challenged provisions of Section 3583(k) are enforceable if a jury is convened to find the required facts.

ARGUMENT

I. THE DISTRICT COURT'S ADMINISTRATION OF RESPONDENT'S PREVIOUSLY IMPOSED SENTENCE UNDER SECTION 3583(k) WAS CONSTITUTIONALLY VALID

Nothing in the Fifth or Sixth Amendments precluded the district court from relying on its factual findings by a preponderance of the evidence to apply 18 U.S.C. 3583(k) in administering the sentence it had previously imposed on respondent. That previously imposed sentence included a term of supervised release, during which respondent's liberty was conditioned on court-overseen compliance with explicit and specific requirements. In administering respondent's sentence, the court was not required to hold a jury trial as a prerequisite to determining that respondent had violated a particular supervised-release condition that required revocation and reimprisonment under Section 3583(k). Both judicial and historical precedent make clear that such a determination is part of the administration of a sentence—not a new "criminal prosecution" to which a jury-trial right might attach.

A. The Constitutional Right To A Jury Finding Beyond A Reasonable Doubt Does Not Apply To Postjudgment Revocation Of A Defendant's Conditional Liberty

The Sixth Amendment guarantees the right to a jury "[i]n all criminal prosecutions." U.S. Const. Amend. VI. In construing that guarantee and the "companion right" under the Fifth Amendment to have the jury find each element of a crime beyond a reasonable doubt, *Apprendi* v. *New Jersey*, 530 U.S. 466, 478 (2000), this Court has distinguished between proceedings relevant

to the *imposition* of a sentence and proceedings relevant to the *administration* of a sentence. The Court has held that imposition of the sentence is part of a "criminal prosecution" under the Sixth Amendment, but has consistently recognized that administration of a sentence is not. Postjudgment proceedings involving the revocation of conditional liberty fall into the latter category—they are sentence-administration proceedings that do not trigger the jury-trial right.

1. Administering a sentence by revoking a defendant's conditional liberty is not part of a "criminal prosecution" that requires jury factfinding

The plain text of the Sixth Amendment, and this Court's precedents interpreting its protections, illustrate that the right to a jury finding beyond a reasonable doubt does not apply to facts concerning the implementation of the sentence. Such facts arise after the criminal prosecution has ended and do not expand the sentence beyond the boundaries of what the jury's verdict (or the defendant's plea) authorized.

a. The Sixth Amendment's application to "all criminal prosecutions," U.S. Const. Amend. VI, has long been understood as referring solely to the proceedings through which final judgment is entered on a charge, and not to postjudgment sentence-administration proceedings. Noah Webster's Founding-era dictionary, for example, defined "prosecution" as "[t]he institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment." 2 Noah Webster, *An American Dictionary of the English Language* (1828). And "Blackstone's usage" of the term "appears to have accorded with th[at] ordinary meaning." *Rothgery* v. *Gillespie Cnty.*,

554 U.S. 191, 221-222 (2008) (Thomas, J., dissenting); see *id.* at 219-222. Blackstone defined the "prosecution" of criminal offenders as "the manner of their formal accusation," 4 William Blackstone, *Commentaries on the Laws of England* 298 (1769) (4 Blackstone), which he distinguished from other phases of the criminal process, such as "execution" of the sentence, *id.* at 286.

In accord with the plain meaning of the term "criminal prosecution," this Court has repeatedly recognized that the Sixth Amendment does not require a jury finding beyond a reasonable doubt in a postjudgment proceeding involving only the implementation of a sentence that has already been imposed. In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), for example, the Court held that the Sixth Amendment does not extend to a proceeding concerning the "revocation of parole," in which a defendant who has been serving part of his sentence out of prison, subject to conditions, may be reimprisoned for violating those conditions (with no credit for the time spent on parole). *Id.* at 480; see *id.* at 479-480. The Court viewed parole revocation as part of the "[s]upervision" of the sentence, explaining that parole—and thus its revocation —"arises after the end of the criminal prosecution, including imposition of sentence." *Id.* at 480.

Likewise, in *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), the Court reached an identical conclusion with respect to a proceeding concerning the revocation of probation, in which a defendant whose sentence consisted of a term of conditional liberty was sent to prison for violating the conditions that were imposed. *Id.* at 779-781. The Court explained that "[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution." *Id.* at 782. Additionally, in *Wolff* v. *McDonnell*, 418 U.S.

539 (1974), the Court recognized that "[p]rison disciplinary proceedings," such as the denial of good-time credit on a sentence already imposed, "are not part of a criminal prosecution," and that "the full panoply of rights due a defendant in such proceedings does not apply." *Id.* at 556.

b. The prospect that postjudgment facts may affect a defendant's liberty, through the enforcement of the terms of the defendant's sentence, does not in itself trigger any requirement that a jury find such facts beyond a reasonable doubt. The Court has recognized that a defendant whose parole is revoked "may face a potential of substantial imprisonment," *Morrissey*, 408 U.S. at 480; that there is a "loss of liberty entailed" in the revocation of probation, *Gagnon*, 411 U.S. at 781; and that the denial of good-time credit "can postpone the date of eligibility for parole and extend the maximum term to be served," *Wolff*, 418 U.S. at 561. Yet in each circumstance, the Court has explained that the potential deprivation of liberty is protected by tailored due process requirements, not the more categorical rights that the Sixth Amendment attaches to a formal "criminal prosecution." See *Morrissey*, 408 U.S. at 489; *Gagnon*, 411 U.S. at 782; *Wolff*, 418 U.S. at 561.

In *Morrissey*, for example, the Court explained that certain "minimum requirements of due process" apply to the revocation of parole, including (1) a preliminary hearing if the person is arrested, (2) "written notice of the claimed violations of parole," (3) disclosure of the evidence against the person, (4) the "opportunity to be heard in person and to present witnesses and documentary evidence," (5) "the right to confront and cross-examine adverse witnesses (unless the hearing officer

specifically finds good cause for not allowing confrontation)," (6) a "'neutral and detached'" hearing body, and (7) "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." 408 U.S. at 489. The Court adopted the same protections for probation revocation, along with the possibility of a right to counsel in some circumstances. *Gagnon*, 411 U.S. at 782, 789. And the Court has similarly held that prisoners contesting the revocation of good-time credits that would shorten their prison terms were entitled to certain procedural protections, but less than the "range of procedures suggested by *Morrissey*" for parole revocation, and far less than would be required in a "criminal prosecution." *Wolff*, 418 U.S. at 561.

In specifying the requirements for a parole-revocation hearing, the Court "emphasize[d] that there is no thought to equate" such a hearing "to a criminal prosecution in any sense." *Morrissey*, 408 U.S. at 489. And the Court stressed that any right to counsel in the context of a probation-revocation hearing arises not from the Sixth Amendment—which does not apply because probation revocation does not involve the "right of an accused to counsel in a criminal prosecution"—but rather from the "more limited due process right" applicable to a defendant who has already "been convicted of a crime." *Gagnon*, 411 U.S. at 789; cf. *Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935) (holding that a federal probationer had a statutory right to a hearing before a judge, but observing that he may not "insist upon a trial in any strict or formal sense").

In none of the decisions did the Court suggest that a jury finding beyond a reasonable doubt would be required as a prerequisite to additional imprisonment for a defendant's violation of the terms of his conditional

liberty. To the contrary, the Court recognized that a "traditional parole board," or similar entity, could find the relevant facts. *Morrissey*, 408 U.S. at 489; see *Gagnon*, 411 U.S. at 781-782 (permitting revocation of probation based on findings by a state administrative agency); *Minnesota* v. *Murphy*, 465 U.S. 420, 435 n.7 (1984) (stating that "there is no right to a jury trial" before revocation of probation).

2. The Sixth Amendment-based Apprendi rule applies only to the imposition of a sentence

In *Apprendi* v. *New Jersey*, *supra*, and a series of related decisions, this Court has clarified that the jury-trial right "is implicated whenever a judge seeks to impose a sentence" based on a mandatory sentencing range that is not "solely based on 'facts reflected in the jury verdict or admitted by the defendant'" (or the fact of a prior conviction). *United States* v. *Booker*, 543 U.S. 220, 232 (2005) (citation omitted). The Court has continued, however, to recognize that "indeterminate schemes" of sentencing that "involve judicial factfinding" by "a judge" or "a parole board" do not implicate the jury-trial right. *Blakely* v. *Washington*, 542 U.S. 296, 309 (2004); see *Cunningham* v. *California*, 549 U.S. 270, 276 (2007) (distinguishing State's prior "indeterminate sentence regime" that relied on parole from subsequent scheme that violated *Apprendi*); see also *United States* v. *Knights*, 534 U.S. 112, 120 (2001) (non-*Apprendi* case noting that "revocation of probation, and possible incarceration," occurs "in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt * * * do not apply").

In explaining the scope of the jury-trial right, *Apprendi* looked to the historical scope of "criminal proceedings," identifying "indictment," "trial by jury," and

"judgment by court" as the relevant stages. 530 U.S. at 478. The Court described the last of those stages—"judgment by court"—as "the stage approximating in modern terms the imposition of the sentence." *Id.* at 478 n.4 (citing 4 Blackstone 378). Subsequent cases have accordingly framed the *Apprendi* rule—that "[t]he Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant's" statutory sentencing range, *Southern Union Co.* v. *United States*, 567 U.S. 343, 346 (2012)—as one applicable to the "impos[ition]" of a sentence, rather than any subsequent proceedings, *Booker*, 543 U.S. at 232; see *Cunningham*, 549 U.S. at 274-275; *Blakely*, 542 U.S. at 303-304.

Nothing in the *Apprendi* rule suggests application of the jury-trial right to postjudgment facts that relate only to the administration of a previously imposed sentence. The "animating principle" of the *Apprendi* rule "is the preservation of the jury's historic role as a bulwark between the State and the accused *at the trial for an alleged offense*." *Oregon* v. *Ice*, 555 U.S. 160, 168 (2009) (emphasis added); see *Alleyne* v. *United States*, 570 U.S. 99, 114 (2013); *Apprendi*, 530 U.S. at 477. The Court has accordingly recognized that the facts a jury must find beyond a reasonable doubt are the same facts that must be alleged on "the face of the indictment" to ensure that the defendant receives adequate notice of the possible penalties for his crime. *Alleyne*, 570 U.S. at 113-114; see *United States* v. *Cotton*, 535 U.S. 625, 627 (2002); *Apprendi*, 530 U.S. at 476, 478. The Court has thus frequently looked to indictment-stage practices to determine the scope of the *Apprendi* rule. See

Alleyne, 570 U.S. at 109-111, 117 (plurality opinion); *Apprendi*, 530 U.S. at 480 (discussing necessity that "essential elements * * * be alleged in the indictment").

Facts that do not exist before the sentence is imposed, let alone at the time the defendant is charged, cannot be included in the indictment or be part of the criminal trial. Accordingly, neither *Apprendi* nor any of its progeny has applied its rule to such facts. Instead, each has required jury findings of facts relevant to the range of sentences the court may lawfully impose in the first instance. See, *e.g.*, *Alleyne*, 570 U.S. at 116 (imposition of statutory minimum sentence); *Southern Union*, 567 U.S. at 346 (imposition of "sentences of criminal fines"); *Cunningham*, 549 U.S. at 275 (imposition of enhanced sentence); *Booker*, 543 U.S. at 230-244 (imposition of sentence under mandatory sentencing guidelines); *Blakely*, 542 U.S. at 305 (same); *Apprendi*, 530 U.S. at 490 (imposition of sentence above statutory maximum).

Application of the Sixth Amendment to postjudgment sentence-administration issues would be especially difficult to square with the Court's decision in *Oregon* v. *Ice*, *supra*. In *Ice*, the Court recognized that the jury-trial right did not apply to facts bearing on decisions about whether sentences for different offenses should run concurrently or consecutively. See 555 U.S. at 164. The Court observed that all of its *Apprendi* "decisions involved sentencing for a discrete crime," as distinct from "administering multiple sentences" that are imposed "for multiple offenses different in character or committed at different times." *Id.* at 167-168. Even though the determination whether to run sentences concurrently or consecutively is inextricably intertwined with the imposition of those sentences, the Court did not

treat that determination as a part of the "criminal prosecution" for Sixth Amendment purposes. "Intruding *Apprendi*'s rule into" such determinations, the Court explained, "would cut the rule loose from its moorings." *Id.* at 171-172. Sentence-administration issues that arise only after the defendant has begun serving the sentence are even more attenuated from the criminal prosecution, and likewise cannot be treated as part of it.

3. Historical practice confirms that juries have no role in the revocation of conditional liberty

The Court's consistent distinction between imposition and administration of a sentence finds firm grounding in historical practices. As this Court has repeatedly explained, "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." *Southern Union*, 567 U.S. at 353 (quoting *Ice*, 555 U.S. at 170); see, *e.g.*, *Blakely*, 542 U.S. at 301-302; *Apprendi*, 530 U.S. at 477-484. Where the "historical record demonstrates that the jury played no role in" a particular decision, the Court has declined to extend the jury-trial right beyond "the jury's traditional domain." *Ice*, 555 U.S. at 168. The historical record here demonstrates that the jury's traditional domain has not included facts relevant solely to the revocation of conditional liberty. Both of the principal forms of conditional liberty historically recognized at common law—parole and probation—could be revoked, leading to a defendant's imprisonment, without any jury findings beyond a reasonable doubt.

a. Parole traces its common-law roots to England's penal colonies in Australia, where officials had authority to grant prisoners a "conditional pardon" as early as 1790. 4 U.S. Dep't of Justice, *The Attorney General's Survey of Release Procedures: Parole* 11 (1939) (*Parole*

Survey). That authority evolved into the power to grant a "ticket-of-leave," which allowed a prisoner to earn conditional release for good behavior, but which could be revoked for misconduct. *Ibid.* In 1843, a similar program granted "'tickets of license'" to prisoners within England itself. *Id.* at 12-13. Ireland followed with a modified and "more successful" system of "conditional liberation," which required prisoners to satisfy training and employment requirements before release "upon certain conditions, the violation of which led to reincarceration." *Id.* at 13.

On this side of the Atlantic, States began adopting parole and related systems of indeterminate sentencing and conditional liberty in the nineteenth century. The first indeterminate sentencing law was New York's "good-time law," which the state legislature enacted in 1817. *Parole Survey* 15. The law provided for reductions in prisoners' terms of incarceration as a reward for good behavior, and "many States" adopted similar laws over the ensuing decades. *Ibid.* New York was also the site of the first parole system, which was adopted in 1876 and provided for released prisoners to remain "under * * * supervision" for a period of six months, "during which time their paroles could be revoked if they violated any of the conditions attached to their releases." *Id.* at 19-20. Other States soon adopted similar models, see *id.* at 20, and parole became "an integral part of the penological system" by the early twentieth century, *Morrissey*, 408 U.S. at 477.

In 1910, Congress enacted the Parole Act, ch. 387, 36 Stat. 819, which authorized the release of a federal prisoner who had served a portion of his sentence if a parole board found "a reasonable probability that" the

prisoner would "live and remain at liberty without violating the laws." § 3, 36 Stat. 819. Release on parole was subject to "such terms and conditions" as the parole board "shall prescribe." § 3, 36 Stat. 820. A parolee remained "under the control of the warden," who was authorized to "retak[e]" the parolee upon "reliable information that [he] has violated his parole." §§ 3, 4, 36 Stat. 820. The parole board could then "revoke" parole and require the prisoner to "serve the remainder of the sentence originally imposed," with no reduction for "the time the prisoner was out on parole." § 6, 36 Stat. 820; see *Anderson* v. *Corall*, 263 U.S. 193, 195-196 (1923) (describing revocation of parole by federal parole board). As with all of the predecessor systems, no jury was involved.

b. Probation, another form of conditional liberty, developed in a generally similar way. See 2 U.S. Dep't of Justice, *The Attorney General's Survey of Release Procedures: Probation* 1 (1939) (*Probation Survey*). "The concept of probation * * * evolved out of the [English] practice of judicial reprieve," which entailed "a temporary suspension of sentence to allow a defendant to appeal to the crown for a pardon." Howard Abadinsky, *Probation and Parole: Theory and Practice* 96 (9th ed. 2006) (emphasis omitted). Some early American courts relied on a version of that practice to justify "an indefinite suspension of sentence" where a defendant presented "mitigating circumstances," although no statutes formally authorized such a suspension. *Probation Survey* 6-7.

In 1878, the Massachusetts legislature passed "what may be considered the first probation statute." *Probation Survey* 22. The statute authorized the mayor of

Boston to appoint a police officer or other citizen to attend court sessions and "recommend to such courts the placing on probation of such persons as may reasonably be expected to be reformed without punishment." *Id.* at 22 n.75 (citation omitted). The statute directed the probation officer to "make reports as often at least as once in every 3 months" on the individuals released on probation. *Ibid.* (citation omitted). And the statute provided that any person on probation "may be rearrested" by a probation officer "without further warrant, and again brought before the court," which could then order imprisonment. *Ibid.* (citation omitted). Other States followed by enacting similar laws. *Id.* at 25-27.

In 1925, Congress passed the Probation Act, ch. 521, 43 Stat. 1259, which adopted an analogous probation system for federal courts. See *United States* v. *Murray*, 275 U.S. 347, 357-358 (1928) (elaborating on the enactment and purpose of the Probation Act). The statute gave district courts the power, in cases where the offense was not punishable by death or life imprisonment, "to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best." 43 Stat. 1259. The statute directed probation officers to periodically report to the court on the defendant's compliance with the conditions of probation, § 2, 43 Stat. 1260, and authorized the court to "discharge the probationer from further supervision" or "extend the probation, as shall seem advisable," *ibid.* The statute also provided that "[a]t any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest," and that the court "may revoke the probation or the suspension of sentence, and may impose any

sentence which might originally have been imposed." *Ibid.* As this Court explained early on, the decision whether to revoke probation "rests in the court's discretion" and does not require any "formal procedure," such as a jury "trial upon charges." *Burns* v. *United States*, 287 U.S. 216, 221-222 (1932).

The probation statute today similarly empowers courts to impose probation on a limited class of offenders, 18 U.S.C. 3561; to set conditions for the probationer to meet while on release, 18 U.S.C. 3563; and to revoke probation if "the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation" in proceedings subject to Federal Rule of Criminal Procedure 32.1, 18 U.S.C. 3565(a). Neither the federal nor any state system of probation provides for a jury to find the facts justifying revocation beyond a reasonable doubt.

B. The Right To A Jury Finding Beyond A Reasonable Doubt Did Not Apply To The Revocation Of Respondent's Supervised Release

The text, judicial precedent, and history of the jury-trial right all demonstrate that the proceeding in which respondent's supervised release was revoked and he was reimprisoned under 18 U.S.C. 3583(k) was not part of a "criminal prosecution" to which the jury-trial right would attach. Like the revocation of parole or probation, or the denial of good-time credits, respondent's revocation was a sentence-administration function that occurred "after the end of the criminal prosecution, including imposition of sentence." *Morrissey*, 408 U.S. at 480. Respondent has not disputed that the imposition of the supervised-release portion of his sentence, including the conditions on his provisional liberty and the

prospect of reimprisonment for violating those conditions, was constitutionally authorized by the jury's findings at trial. Nothing in the Constitution required the district court to convene another jury in order to administer the explicit terms of its lawfully imposed sentence through its application of Section 3583(k).

1. This Court's recognition that the jury-trial right does not apply to parole-revocation proceedings, see *Morrissey*, 408 U.S. at 480, or probation-revocation proceedings, see *Gagnon*, 411 U.S. at 781, applies with full force to the supervised-release proceedings at issue here. Supervised release closely resembles parole and probation as a form of conditional liberty that is "part of the sentence" a defendant may receive for his initial conviction. 18 U.S.C. 3583(a); see, *e.g.*, *Morrissey*, 408 U.S. at 479-480. Like parole and probation, supervised release carries the possibility of revocation and imprisonment if a defendant violates the conditions on his liberty. See, *e.g.*, 18 U.S.C. 3583(e)(3), (g), and (k); *Gagnon*, 411 U.S. at 779-780; *Morrissey*, 408 U.S. at 480. And like parole and probation, supervised release is revoked (and imprisonment potentially imposed) based on facts that do not exist at the time of sentencing and that relate to the defendant's noncompliance with the sentence's terms—facts the jury could not have found in the first instance and that juries traditionally have not been asked to find.

Congress's adoption of supervised release to replace parole in the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, § 212(a)(2), 98 Stat. 1999, did not change any features of the scheme that would be relevant here. To the contrary, "[c]ourts have commented on the similarity" between parole, "which by

definition [i]s a release under supervision of a parole officer following service of some term of incarceration," and supervised release, which is the same type of release under supervision of a judicial officer. *Johnson* v. *United States*, 529 U.S. 694, 711 (2000). In *Johnson*, this Court itself relied on parole-system practices to inform its interpretation of the supervised-release statutes. See *id.* at 710-712.

The two systems do have important differences—for example, supervised release is "overseen by the sentencing court," rather than an executive agency. *Johnson*, 529 U.S. at 697. But in considering the constitutional requirements of a parole-revocation proceeding, the Court has viewed factfinding by judicial officers as an *additional* protection that may optionally be provided, see, *e.g.*, *Morrissey*, 408 U.S. at 489, not as a reason for imposing new constitutional procedural requirements, or for considering the proceeding to be part of a criminal prosecution, see, *e.g.*, *Black* v. *Romano*, 471 U.S. 606, 609, 611-612 (1985) (applying same due-process protections as in parole context when sentencing judge revokes probation). If anything, the fact that supervised-release revocation is ordinarily initiated by a judicial officer or the court itself, not by a prosecutor or other executive official, further underscores that it is not properly considered part of a criminal prosecution.

2. Requiring jury findings beyond a reasonable doubt for supervised-release revocations like respondent's would be just as doctrinally and practically unsound as requiring them for parole and probation revocations. In a supervised-release revocation proceeding, a defendant is no longer "the accused" at a "trial for an alleged offense." *Ice*, 555 U.S. at 168. The defendant has been found "guilty of a crime against the

people," either by trial or plea, and accordingly faces deprivation "not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special" conditions of supervised release, *Morrissey*, 408 U.S. at 480, 483; see *Johnson*, 529 U.S. at 712 (describing supervised release as a form of "limited liberty").

As this Court has explained, the fact that an individual has been convicted of a crime and released into society only on a promise to comply with specified conditions justifies "extensive restrictions on the individual's liberty" that would not otherwise be permissible. *Morrissey*, 408 U.S. at 483. The Court, for example, has recognized that parolees challenging the reasonableness of searches have "severely diminished" Fourth Amendment rights "by virtue of their status alone." *Samson* v. *California*, 547 U.S. 843, 852 (2006); see *Knights*, 534 U.S. at 119 (same for probationers). Indeed, many of the standard conditions of supervised release, such as the requirements to provide a DNA sample and refrain from firearms possession, could create constitutional questions if imposed on members of society who have absolute rather than only "conditional" liberty. *Morrissey*, 408 U.S. at 483-484; see 18 U.S.C. 3583(d); 1 C.A. App. 31-32 (prohibiting respondent from viewing adult pornography, which is generally protected by the First Amendment). It is thus widely accepted that individuals in respondent's position are differently situated from those who can claim the full extent of the constitutional protections against a deprivation of their absolute liberty.

As with parole and probation revocations, moreover, jury findings in the context of supervised-release revo-

cation, while not impossible, would be highly burdensome and impractical. The court and the parties would have to convene a new jury to find the facts every time a probation officer alleges a supervised-release violation. That stark departure from settled practice would effectively create "bifurcated or trifurcated" trials that have no precedent and "make scant sense." *Ice*, 555 U.S. at 171-172. It would also change the "informal" character of revocation hearings, which this Court has repeatedly approved in the parole and probation contexts. *Morrissey*, 408 U.S. at 484; see *Black*, 471 U.S. at 613 (describing the "flexible, informal nature" of probation-revocation hearings).

3. Although *Johnson* did not directly present the question, the Court's opinion in that case strongly suggests that a jury finding beyond a reasonable doubt is not required before a court may revoke a defendant's supervised release and order reimprisonment. The court of appeals decision that the Court reviewed in *Johnson* had viewed revocation of supervised release as punishment for "new offenses" committed in violation of supervised-release conditions. 529 U.S. at 700 (citation omitted). This Court, however, disagreed with the court of appeals' reasoning on that point. See *id.* at 700-701. In so doing, this Court considered, and treated as constitutionally unproblematic, the use of judicial factfinding to trigger revocation of supervised release and reimprisonment.

The Court in *Johnson* "attribute[d] postrevocation penalties to the original conviction," observing that "construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release" would raise "serious constitutional questions." 529 U.S. at 700-701. The Court first observed that

"[a]lthough such violations often lead to reimprisonment, the violative conduct need not be criminal and need only be found by a judge under the preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Id.* at 700 (citing 18 U.S.C. 3583(e)(3) (1988)). The Court also observed that "[w]here the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense." *Ibid.* "Treating postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties." *Ibid.*

The Court in *Johnson* thus perceived potential "constitutional questions" in allowing supervised-release violations to be found by a judge by a preponderance of the evidence *only* if revocation and reimprisonment were treated as criminal punishment distinct from the underlying conviction. 529 U.S. at 700. But attributing revocation and reimprisonment to "the original conviction" for which supervised release was imposed—a conviction that would itself be based on facts as to which the defendant would have a jury-trial right—"avoid[ed] the[] difficult[y]." *Id.* at 700-701. Although the decision in *Johnson* did not specifically reference the Sixth Amendment, the Court decided *Johnson* only a month before *Apprendi*, and just one Term after it had "foreshadowed" the *Apprendi* rule and construed a different federal statute to avoid it. *Apprendi*, 530 U.S. at 476; *Jones* v. *United States*, 526 U.S. 227, 239-252 & n.6 (1999).

The Court, moreover, supported its resolution of the potential constitutional difficulties identified in *John-*

son in part through a citation to a Second Circuit decision that had "not[ed] [the] absence of constitutional procedural protections in revocation proceedings." 529 U.S. at 700 (citing *United States* v. *Meeks*, 25 F.3d 1117, 1123 (1994)). The Second Circuit in that case had found "no right to trial by jury" in supervised-release revocation proceedings and explained that the "government need prove the alleged supervised-release violation only by a preponderance of the evidence, not beyond a reasonable doubt." *Meeks*, 25 F.3d at 1123. The Court in *Johnson* also included a "Cf." citation to *Gagnon*'s holding that "[p]robation revocation ... is not a stage of a criminal prosecution," suggesting that the Court viewed supervised-release revocation as similarly outside the scope of the Sixth Amendment's jury-trial right. 529 U.S. at 700 (quoting *Gagnon*, 411 U.S. at 782).

4. Consistent with *Johnson*—as well as *Gagnon* and *Morrissey*—courts of appeals addressing whether the jury-trial right recognized in *Apprendi* applies in supervised-release revocation proceedings have concluded that the "law is clear that once the original sentence has been imposed in a criminal case, further proceedings with respect to that sentence are not subject to Sixth Amendment protections." *United States* v. *Work*, 409 F.3d 484, 491 (1st Cir. 2005). Indeed, aside from the decision below, no court of appeals has concluded that the jury-trial right applies to supervised-release revocation and reimprisonment. See *ibid.*; *United States* v. *Carlton*, 442 F.3d 802, 806-810 (2d Cir. 2006); *United States* v. *Dees*, 467 F.3d 847, 854-855 (3d Cir. 2006), cert. denied, 552 U.S. 830 (2007); *United States* v. *Ward*, 770 F.3d 1090, 1096-1099 (4th Cir. 2014); *United States* v. *Hinson*, 429 F.3d 114, 117-119 (5th Cir. 2005), cert. denied, 547 U.S. 1083 (2006); *United States* v.

Johnson, 356 Fed. Appx. 785, 790-792 (6th Cir. 2009) (Moore, J., joined by O'Connor, J., sitting by designation); *United States* v. *McIntosh*, 630 F.3d 699, 703 (7th Cir.), cert. denied, 563 U.S. 951 (2011); *United States* v. *Gavilanes-Ocaranza*, 772 F.3d 624, 628-629 (9th Cir. 2014), cert. denied, 136 S. Ct. 225 (2015); *United States* v. *Cordova*, 461 F.3d 1184, 1186 (10th Cir. 2006); *United States* v. *Cunningham*, 607 F.3d 1264, 1266-1268 (11th Cir.) (per curiam), cert. denied, 562 U.S. 971 (2010).

For similar reasons, courts of appeals have broadly recognized that other provisions of the Sixth Amendment do not apply to supervised-release revocation proceedings because such proceedings are not part of the "criminal prosecutions" covered by the Sixth Amendment. See, *e.g.*, *United States* v. *Rondeau*, 430 F.3d 44, 47-48 (1st Cir. 2005) (Confrontation Clause); *United States* v. *Aspinall*, 389 F.3d 332, 342 (2d Cir. 2004) (same); *United States* v. *Kirby*, 418 F.3d 621, 628 (6th Cir. 2005) (same); *United States* v. *Kelley*, 446 F.3d 688, 690-692 (7th Cir. 2006) (same); *United States* v. *Ray*, 530 F.3d 666, 668 (8th Cir. 2008) (same); *United States* v. *Hall*, 419 F.3d 980, 988-989 & n.4 (9th Cir.) (same), cert. denied, 546 U.S. 1080 (2005); *United States* v. *Reese*, 775 F.3d 1327, 1329 (11th Cir. 2015) (per curiam) (same); *United States* v. *Tippens*, 39 F.3d 88, 89 (5th Cir. 1994) (per curiam) (Speedy Trial Clause); *United States* v. *House*, 501 F.3d 928, 931 (8th Cir. 2007) (same); *Gavilanes-Ocaranza*, 772 F.3d at 628; *United States* v. *Boultinghouse*, 784 F.3d 1163, 1171 (7th Cir. 2015) (right to counsel); *United States* v. *Owen*, 854 F.3d 536, 541 (8th Cir. 2017) (same); *United States* v. *Spangle*, 626 F.3d 488, 494 (9th Cir. 2010) (same), cert. denied 565 U.S. 885 (2011).

Indeed, the Tenth Circuit itself recognized in *United States* v. *Henry*, 852 F.3d 1204, 1206 (2017) (Gorsuch, J.), that "the Confrontation Clause of the Sixth Amendment does not apply to supervised release revocation proceedings." *Id.* at 1206. No sound reason exists to take a different view with respect to the jury-trial right.

C. The Court Of Appeals Erred In Deeming Section 3583(k) Constitutionally Invalid

The district court's application of Section 3583(k) to respondent was constitutional. As the court of appeals recognized, and respondent does not dispute, the jury's conviction of respondent for violating 18 U.S.C. 2252(a)(4)(B) authorized a term of supervised release of five years to life. See 18 U.S.C. 3583(k); see also Pet. App. 27a (finding no constitutional infirmity with that portion of Section 3583(k)). The district court imposed a ten-year term of supervised release, during which respondent was entitled to remain outside of prison only so long as he complied with the explicit conditions of that release. Pet. App. 37a; see *Johnson*, 529 U.S. at 700. After respondent violated those conditions, the court, in its role as the "oversee[r]" of respondent's sentence, *Johnson*, 529 U.S. at 697, constitutionally applied Section 3583(k) to effectively modify that ten-year term of supervised release to five years of reimprisonment followed by five years of supervised release. The majority below erred in concluding that those sentence-administration proceedings were unconstitutional. See Pet. App. 31a-34a (Kelly, J., concurring in part and dissenting in part).

1. The majority below explicitly acknowledged that "[r]evocation of supervised release is not part of a criminal prosecution, so defendants accused of a violation of the conditions of supervised release have no right to a

jury determination of the facts constituting that violation." Pet. App. 17a; see *id.* at 19a n.1. Respondent likewise acknowledges that "revocation of supervised release may not directly contemplate a 'criminal prosecution' under the terms of the Sixth Amendment." Br. in Opp. 15. The majority below nevertheless reasoned (and respondent has suggested in this Court, see *id.* at 17-20) that this Court's decision in *United States* v. *Booker*, *supra*—which applied the *Apprendi* rule to the imposition of a sentence under the then-mandatory federal Sentencing Guidelines—prescribed relevant limitations that would "appl[y] to all sentencing proceedings, including the imposition of a subsequent term of imprisonment following revocation of supervised release." Pet. App. 19a. That reasoning is unsound.

As an initial matter, the majority's position that "the Sixth Amendment does not require particular procedures in a revocation hearing" but that revocation under Section 3583(k) nevertheless contravenes this Court's holding in *Booker*, Pet. App. 19a-20a n.1, is "hard to understand," *id.* at 32a (Kelly, J., concurring in part and dissenting in part). The holding of *Booker* does not exist apart from the Sixth Amendment; as the majority expressly recognized, "*Booker* itself relied on the Sixth Amendment." *Id.* at 20a n.1; see *Booker*, 543 U.S. at 226 ("The question presented * * * is whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment."). Accordingly, the majority's acknowledgment that "the Sixth Amendment's protections cannot be directly invoked" in the context of supervised-release revocation, Pet. App. 19a n.1—and respondent's similar acknowledgment in this Court, Br. in Opp. 15—should foreclose any application of *Booker* here.

In any event, the majority below erred in treating the proceedings at issue in this case as constitutionally indistinguishable from the proceedings at issue in *Booker*. The proceedings at issue in *Booker*—the initial imposition of a sentence following a criminal conviction, see 543 U.S. at 227-228—were unquestionably part of a "criminal prosecution" for Sixth Amendment purposes. Although "proceedings for violations of supervised release" are sometimes referred to as "sentencing" or "resentencing" proceedings, *Johnson*, 529 U.S. at 702, 708, such a proceeding "is not * * * a precise reenactment of the initial sentencing," *id.* at 712. Whatever nomenclature might be used to describe it, a supervised-release revocation proceeding remains a postjudgment proceeding aimed at determining the appropriate consequences for the defendant's violation of the conditions under which he has been allowed to serve part of his sentence outside of a prison. It is neither a replacement for, nor a continuation of, the original sentencing, and it therefore does not require jury factfinding. Cf. *Dillon* v. *United States*, 560 U.S. 817, 828 (2010) (holding that *Booker* does not apply to postjudgment sentence-modification proceedings under 18 U.S.C. 3582(c)(2), even though they are sometimes called resentencings).

The majority's contrary approach appears to be premised on the view that all proceedings that result in greater imprisonment are "sentencing proceedings" that require jury factfinding under *Booker*. Pet. App. 19a. But such a view cannot be squared with *Morrissey*, *Gagnon*, and *Wolff*, each of which involved proceedings that resulted in greater prison time but did not require jury findings under the Sixth Amendment. See pp. 25-27, *supra*. *Booker*, moreover, cited Section 3583 as a

component of federal sentencing law that remains "perfectly valid" notwithstanding the Court's holding that the mandatory Sentencing Guidelines violated the Sixth Amendment. 543 U.S. at 258.

The majority below similarly had no basis to view the five-year minimum period of reimprisonment for a supervised-release violation required by Section 3583(k) as an "increase[]" in the "minimum sentence to which [respondent] may be subjected." Pet. App. 20a; see *id.* at 21a. At respondent's initial sentencing, the court was authorized to impose a sentence of zero to ten years of imprisonment, 18 U.S.C. 2252(b)(2), to be followed by at least five years of supervised release, which could be revoked and converted to at least five years of reimprisonment if respondent violated his conditions of release in specified ways, 18 U.S.C. 3583(k). The district court's subsequent determination that respondent had violated the conditions of his supervised release in ways that trigger a minimum of five years of reimprisonment did not "increase[]" the sentence to which he was "exposed" in any way. Pet. App. 20a-21a. The court simply implemented the sentence that respondent received initially and was "exposed" to all along. *Id.* at 21a.

2. To the extent the majority below viewed a jury finding as necessary to trigger the statutorily required five-year minimum period of reimprisonment under 18 U.S.C. 3583(k), rather than the shorter zero-to-two-year term of reimprisonment that would have been authorized for a class C felony under 18 U.S.C. 3583(e)(3), that view was equally mistaken. Section 3583(k)'s requirement that a court revoke supervised release and reimprison a defendant for a minimum period does not alter the basic fact that a supervised-release revocation proceeding is not part of a "criminal prosecution." See

pp. 35-42, *supra*; *Ward*, 770 F.3d at 1097 (rejecting challenge to mandatory reimprisonment requirement in 18 U.S.C. 3583(g) (1988) because "supervised release revocation proceedings are not considered part of a criminal prosecution"); see also *United States* v. *Sperling*, 699 Fed. Appx. 636, 637 (9th Cir. 2017) (rejecting challenge to mandatory reimprisonment requirement in Section 3583(k) under plain-error review), petition for cert. pending, No. 17-8390 (filed Mar. 28, 2018).

The majority below accordingly did not dispute that a judicial finding by a preponderance of the evidence would suffice to authorize reimprisonment under Section 3583(e)(3). See, *e.g.*, Pet. App. 15a, 28a. And nothing in *Apprendi* or its progeny, including this Court's decision addressing statutory-minimum sentences in *Alleyne*, supports applying a more stringent standard to reimprisonment under Section 3583(k), simply because the latter requires a longer term of reimprisonment. See *id.* at 16a (acknowledging that "*Alleyne* * * * do[es] not apply to revocation proceedings"). The *Apprendi* rule would apply to a criminal offense with a sentencing range of zero to two years of imprisonment for the same reasons that it would apply to a criminal offense with a sentencing range of five years to life imprisonment. See *Alleyne*, 570 U.S. at 107-108. Thus, if findings of supervised-release violations were actually "element[s] of the offense" subject to the *Apprendi* rule, *id.* at 107-108, then a jury finding beyond a reasonable doubt would be necessary irrespective of the particular range of imprisonment prescribed. The majority's unwillingness to follow its premise to that logical conclusion suggests that the premise itself is flawed. See Pet. App. 32a (Kelly, J., concurring in part and dissenting in part).

3. The majority below likewise erred in attaching constitutional significance to the fact that Section 3583(k)'s application is triggered by a supervised-release violation that corresponds to one of several listed criminal offenses. See Pet. App. 22a-23a. Contrary to the majority's view, that aspect of the statute does not convert a revocation proceeding under Section 3583(k) into a new criminal prosecution that would require convening a jury.

As the dissenting judge below recognized, this Court "has already spoken on this issue." Pet. App. 34a (Kelly, J., concurring in part and dissenting in part). In *Johnson*, the Court recognized that "[w]here the acts of violation [of supervised-release conditions] are criminal in their own right, they may be the basis for separate prosecution." 529 U.S. at 700. In such a separate prosecution, which would provide the predicate for a separate criminal punishment, the *Apprendi* rule would of course apply. But in the context of a supervised-release revocation, this Court construed the consequences of the defendant's violation as "part of the penalty for the initial offense," not a new one. *Ibid.*

The possibility of *independent* prosecution and punishment does not suggest that the district court's supervision of *preexisting* punishment is itself a criminal prosecution. It would make little sense for a judicial finding to allow for revocation of supervised release and reimprisonment only when the judge-found conduct is *not* serious enough to match the definition of a criminal offense. The Constitution cannot reasonably be construed to permit revocation and reimprisonment based on a judicial finding of (for example) failure to attend

mandatory counseling, but to forbid revocation and reimprisonment based on a judicial finding of (for example) sexual abuse of a child.

The majority below recognized as much. It acknowledged that a judicial finding that a defendant "commit[ted] a[] crime" can provide the basis for revocation of supervised release and reimprisonment under Section 3583(e)(3). Pet. App. 22a. It believed, however, that a different rule applies to revocation of supervised release and reimprisonment under Section 3583(k). In its view, Section 3583(k) impermissibly punishes new criminal conduct because it does not apply to all supervised-release violations that correspond to criminal offenses (as Section 3583(e)(3) does), but instead applies only to supervised-release violations that correspond to particular listed criminal offenses. See *id.* at 23a. That reasoning is flawed.

The fact that Section 3583(k) assigns higher penalties to particularly serious violations does not "transform[]" the revocation proceeding into a new criminal prosecution." Pet. App. 24a. Nothing requires that every possible supervised-release violation result in reimprisonment for the exact same length of time. Even under Section 3583(e)(3), the sanctions that may be ordered are indeterminate and will ordinarily turn in part on factors such as the nature of the violation and its relationship to the original offense of conviction. Indeed, the Sentencing Guidelines, which the district court is required to consider when imposing a sanction under Section 3583(e)(3), require such an analysis in every case, irrespective of whether Section 3583(k) applies. See Sentencing Guidelines § 7B1.1; see also 18 U.S.C. 3583(e), 3553(a)(4)(B) (requiring consideration of the Guidelines).

It makes no difference that Congress itself prescribed the heightened penalties for the violations listed in Section 3583(k), rather than leaving it to the district court and the Sentencing Commission to account for the nature and severity of the violation. Increased statutory terms of reimprisonment for certain types of conditional-release violations are a common feature of state parole or other post-release supervision.[4] As the dissenting judge below recognized, Congress "can determine that

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[4] See Ark. Code Ann. § 16-93-715(a)(1) (Supp. 2017) (setting different terms of reimprisonment for violation of "technical conditions" and "serious conditions"); Colo. Rev. Stat. § 17-2-103(11)(b) (2017) (authorizing different punishments for violations involving commission of a crime and those that do not); Haw. Rev. Stat. Ann. § 353-66(e) (LexisNexis 2018) (limiting postrevocation confinement to six months for certain categories of violations); Iowa Code Ann. §§ 908.10, 908.10A (West Supp. 2018) (providing for mandatory revocation when a parolee is convicted of a felony or aggravated misdemeanor); Kan. Stat. Ann. § 75-5217(b), (c), and (d) (1997) (limiting length of reincarceration where the violation did not involve a new criminal conviction); La. Rev. Stat. Ann. § 15:574.9(H)(1) and (2) (Supp. 2018) (lower penalty for "technical violations"); Md. Code Ann. Corr. Servs. § 7-401(d) (LexisNexis Supp. 2018) (specifying lower penalty for "technical violation[s]"); N.Y. Exec. Law § 259-i(3)(e)(x) (McKinney 2018) (authorizing period of reincarceration longer than five years for certain sex offenses); N.C. Gen. Stat. §§ 15A-1368.3(c)(1), 15A-1368.4(b) (2017) (limiting postrevocation confinement to three months for violations other than committing a new crime or absconding); 61 Pa. Cons. Stat. Ann. § 6138(a), (c), (d), and (e) (West Supp. 2018) (limiting postrevocation confinement to six months for most types of technical violations); W. Va. Code Ann. §§ 62-12-18, 62-12-19(a), (b), and (c) (LexisNexis 2014) (authorizing higher penalties for new criminal conduct other than a minor traffic offense or simple possession of a controlled substance and requiring mandatory revocation with no further parole for certain serious criminal offenses).

the commission of certain crimes constitutes a more serious breach of trust warranting a longer term of revocation" of supervised release. Pet. App. 33a. Congress could, for example, make a judgment that a particular minimum term of reimprisonment is necessary for a sex offender like respondent who commits a further sex offense while on supervised release, in light of "evidence that recidivism rates among sex offenders are higher than the average for other types of criminals" and the "public safety concerns" posed by such offenders. *United States* v. *Kebodeaux*, 570 U.S. 387, 395 (2013). Or it could conclude more generally that a defendant who has been placed on supervised release for an offense and "again commits a similar offense" has shown that he is "more likely to continue on that path" and that he "has little respect" for the court. *United States* v. *Simtob*, 485 F.3d 1058, 1063 (9th Cir. 2007). Neither conclusion would suggest that Congress is in fact punishing the defendant for a new crime altogether, such that the proceedings should be treated as a "criminal prosecution" under the Sixth Amendment.

II. AT A MINIMUM, 18 U.S.C. 3583(k) IS NOT FACIALLY UNCONSTITUTIONAL

The court of appeals erred not only in its constitutional analysis but also in the remedy it ordered. If this Court reverses the decision below on the merits, as it should for the reasons above, the Court need not address any question of remedy. But if this Court concludes that mandatory revocation and reimprisonment under Section 3583(k) is unconstitutional in the absence of a jury finding beyond a reasonable doubt, the decision below would still require reversal, because the court of appeals improperly declared Section 3583(k)'s requirements "unenforceable." Pet. App. 28a.

As the court of appeals recognized, a court that has found part of a federal statute unconstitutional "must 'refrain from invalidating more of the statute than is necessary.'" Pet. App. 26a (quoting *Booker*, 543 U.S. at 258). All that would be "necessary" here, if the court of appeals' view of the Constitution were correct, would be to require a jury finding beyond a reasonable doubt as a prerequisite to enforcement of any problematic portions of Section 3583(k). The remedy for a deprivation of the jury-trial right is the provision of a jury trial. Although such a requirement would present substantial practical difficulties, see pp. 38-39, *supra*, it is more consistent with Congress's design than complete invalidation. See, *e.g.*, *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010).

This Court's approach in previous *Apprendi* cases is instructive. In *Southern Union*, for example, the Court concluded that facts justifying the imposition of particular criminal fines must be found by a jury beyond a reasonable doubt. 567 U.S. at 360. The Court did not, however, find the statute at issue unenforceable. The Court instead held "that the rule of *Apprendi* applies to the imposition of criminal fines" and remanded for further proceedings consistent with its opinion. *Ibid.* Likewise, in *Cunningham*, the Court suggested that "a separate sentencing proceeding" involving a jury would suffice to cure the *Apprendi* violation. 549 U.S. at 294. If the majority below was correct about the scope of the jury-trial right, it should have followed a similar course and allowed continued enforcement of the statutory provisions that Congress enacted in a way that complied with the majority's view of the Constitution.

Nothing in the text of Section 3583(k) precludes such a remedy. Section 3583(k) requires a court to "revoke

the term of supervised release and require the defendant to serve a term of imprisonment under" Section 3583(e)(3) when the defendant has engaged in certain conduct. 18 U.S.C. 3583(k). Section 3583(e)(3), in turn, authorizes revocation and reimprisonment based on a judicial finding "by a preponderance of the evidence," in accordance with the Federal Rule of Criminal Procedure 32.1. 18 U.S.C. 3583(e)(3); see *Johnson*, 529 U.S. at 700. Section 3583 thus authorizes, as a statutory matter, revocation of supervised release and reimprisonment under Section 3583(k) based on a judicial finding by a preponderance of the evidence. But the statutory procedures do not preclude the application of stricter constitutional procedures, if they are necessary.

A constitutional requirement of a jury finding beyond a reasonable doubt is not incompatible with the statutory requirement of a finding by a judge by a preponderance of the evidence; it is possible to satisfy both requirements in parallel. Thus, if this Court were to conclude that the jury-trial right does apply in the revocation context, the appropriate remedy would be to permit enforcement of Section 3583(k) so long as the statutory procedures are satisfied and a jury makes any required findings beyond a reasonable doubt. That approach would be consistent with any constitutional limitations while still respecting Congress's judgment that public safety requires sex offenders like respondent to serve substantial terms of reimprisonment for particularly problematic violations of the conditions of their supervised release.

As noted above, p. 11, *supra*, Congress enacted the portions of Section 3583(k) at issue here in the Adam Walsh Act, which Congress adopted "to protect the public from sex offenders and offenders against children."

§ 102, 120 Stat. 590. This Court has itself observed that sex offenders pose serious "public safety concerns" in light of their elevated rates of recidivism, *Kebodeaux*, 570 U.S. at 395—presenting a "risk" that "is 'frightening and high,'" *Smith* v. *Doe*, 538 U.S. 84, 93 (2003) (citation omitted); see *United States* v. *Williams*, 553 U.S. 285, 307 (2008) (noting the "threat" of "[c]hild pornography," which "harms and debases the most defenseless of our citizens"). Congress has "long kept track of former federal prisoners through probation, parole, and supervised release in part to prevent further crimes thereby protecting the public against the risk of recidivism." *Kebodeaux*, 570 U.S. at 397. Section 3583(k) serves a particularly important public-safety interest by authorizing extended supervision of sex offenders and providing substantial penalties for those who recidivate by committing additional sexual offenses. Even if this Court were to conclude that additional constitutional procedures are required to enforce Section 3583(k), it should not preclude its enforcement altogether.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

18 U.S.C. 3583 (2012 & Supp. V 2017) provides:

Inclusion of a term of supervised release after imprisonment

(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the fac-

tors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of

release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4).[1] The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

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[1] See References in Text note below.

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) MODIFICATION OF CONDITIONS OR REVOCATION. —The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised

release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) MANDATORY REVOCATION FOR POSSESSION OF CONTROLLED SUBSTANCE OR FIREARM OR FOR REFUSAL TO COMPLY WITH DRUG TESTING.—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised

release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) SUPERVISED RELEASE FOLLOWING REVOCATION.—When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) DELAYED REVOCATION.—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a

warrant or summons has been issued on the basis of an allegation of such a violation.

(j) SUPERVISED RELEASE TERMS FOR TERRORISM PREDICATES.—Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

No. 17-1672

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANDRE RALPH HAYMOND,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

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January 18, 2019

QUESTION PRESENTED

Section 3583(k) required a district court to revoke Andre Haymond's supervised release and impose a prison term of five years to life if it found by a preponderance of the evidence that Mr. Haymond had committed a new offense listed in the statute. But for § 3583(k), the maximum term of imprisonment the district could have imposed was two years based upon Mr. Haymond's original conviction. The question presented is whether § 3583(k) violates the jury trial right.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States at Article III, § 2, in relevant part, provides: "The trial of all crimes, except in cases of impeachment, shall be by jury . . . ."

The Fifth Amendment to the Constitution, in relevant part, provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution, in relevant part, provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Title 18 United States Code, § 3583(e) provides:

> Modification of conditions or revocation.—
>
> The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—
>
> (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that

> resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case . . . .

Title 18 United States Code, § 3583(k) provides:

> Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

STATEMENT OF THE CASE

The district court described the principal issue in this case when revoking Andre Haymond's supervised release and imposing a mandatory-minimum term of imprisonment under § 3583(k): "It's repugnant to me that there is a mandatory five-year sentence in such a case where a defendant does not have the opportunity to ask for a jury or to be tried under what should be the legal stand rd that is beyond a reasonable doubt." Respondent's Appendix 9a ("Resp't App."). The Tenth

Circuit correctly concluded that § 3583(k) was unconstitutional and unenforceable because it imposed a mandatory five-year sentence, up to life, without a jury trial.

Section 3583(k) works an undeniable constitutional harm. It imposes a mandatory minimum penalty far in excess of that otherwise allowable under § 3583(e)(3) and, at the top end, authorizes a potential punishment leagues beyond what a recidivist criminal charge might yield. Under this Court's precedents in *Apprendi*, *Alleyne*, *Booker*, and others, such a potential punishment requires a jury trial where prosecutors must prove their case beyond a reasonable doubt. Here, both the district court and the court of appeals openly acknowledged that the evidence presented at Mr. Haymond's revocation hearing did not meet that standard.

The Solicitor General contends that the application of § 3583(k) is constitutionally permissible because the judicial fact finding at issue "occurred long after [Mr. Haymond's] criminal prosecution had ended and concerned sentence-implementation facts that did not exist when the criminal prosecution occurred." United States Brief 19 ("U.S. Br."). But "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002). A potential lifetime term of imprisonment that is nowhere else authorized in the supervised release statute is "unquestionably of constitutional significance." *Apprendi* v. *New Jersey*, 530 U.S. 466, 495 (2000).

The Solicitor General's alternative remedy—empaneling juries to make some, but not all, factual findings at a revocation hearing—only raises more significant

questions than it answers. Even assuming juries might be assembled for revocation purposes, Congress made no provision for such a proceeding. Indeed, it did the opposite by creating a revocation scheme that, aside from § 3583(k), stays within the *Apprendi* lanes by limiting reimprisonment based upon the nature of the original felony and period of supervised release.

A. Mr. Haymond's 2010 Conviction and Sentence

Mr. Haymond was eighteen years old when he was charged with possession of child pornography under 18 U.S.C. § 2252(a)(4)(B) and (b)(2). *United States* v. *Haymond*, 672 F.3d 948, 950 (10th Cir.), *cert. denied*, 567 U.S. 923 (2012). After a jury trial, Mr. Haymond was found guilty and sentenced to thirty-eight months imprisonment to be followed by ten years of supervised release. *Id.* at 953. The advisory guidelines range was fifty-one to sixty-one months. Statement of Reasons, 2 C.A. App. 23, *United States* v. *Haymond*, No. 10-5079 (10th Cir.), ECF No. 9795139 (filed under seal). The court granted a four-level variance from the guidelines based upon the personal history of Mr. Haymond and because the number of images at issue was small compared to most cases. *Id.* at 25.[1] Mr. Haymond had no criminal history or substance abuse problem. *Id.* The court believed he was intelligent. *Id.* He had attended

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[1] The government's case was based upon seven thumbnail images found on a computer. *Haymond*, 672 F.3d at 951; *see also United States* v. *Helton*, 782 F.3d 148, 158 (4th Cir. 2015) (Gregory, J., concurring) (noting that 79% of non-production cases involve 600 or more images). The computer contained over 60,000 images, mostly related to music. *Haymond*, 672 F.3d at 952. Mr. Haymond presented forensic analysis that indicated the seven images at issue were inaccessible and lacked metadata, making it impossible to determine their origin. *Id.* at 952-53.

community college at age sixteen and obtained an Associate's Degree in order to get out of a family situation where he had little contact with his father and was largely isolated from others his own age. *Id.* Mr. Haymond had worked regularly and was now working to help support his mother, who had suffered a debilitating stroke. *Id.* All of this led the court to conclude that Mr. Haymond would "not get much out of prison" and a sentence outside the guidelines range was appropriate. *Id.*

At sentencing, the court announced the conditions of supervised release that would apply after Mr. Haymond completed his term of imprisonment. Sentencing Transcript, 3 C.A. App. 512, *United States* v. *Haymond*, No. 10-5079 (10th Cir.), ECF No. 9800563. The court further explained that "[s]hould the term of supervised release be revoked, an additional term of imprisonment of two years could be imposed at each revocation." *Id.* at 511. There was no mention that § 3583(k) was an exception to the two-year limit on imprisonment and Mr. Haymond could actually be reimprisoned for life if the court later found by a preponderance of the evidence that he committed a second sex offense.

B. Mr. Haymond's Supervised Release Revocation Proceedings

Upon Mr. Haymond's release from prison in 2013, he began serving his ten-year term of supervised release. Early on during his term, a state law enforcement agent accused Mr. Haymond of failing to register a new address because the officer could not find Mr. Haymond at the motel he had registered as his address. 1 C.A. App. 173-74. The charges were transferred to federal court and Mr. Haymond entered into a deferred prosecution agreement after his probation officer acknowledged that Mr. Haymond was staying

in the motel's parking lot and sleeping in his car because he could not afford to pay for a room. *Id.*

While on supervised release, Mr. Haymond took several lie detector tests and was asked each time whether he had possessed or viewed child pornography since the previous test. Mr. Haymond denied possessing or viewing child pornography each time and each time the test indicated no deception. Petition Appendix 38a ("Pet. App."). The last such test was administered in September 2015, one month before the probation officer conducted an unannounced search of Mr. Haymond's apartment, computers, and cellphone. *Id.* at 38a-39a. On the cellphone, the government found, among thousands of images related to Mr. Haymond's online gaming activities and music interests, fifty-nine thumbnail images the government identified as child pornography. *Id.* at 2a-3a. The government moved to revoke supervised release and alleged five violations of the terms of Mr. Haymond's release, including the possession of child pornography. *Id.* at 35a.

At the revocation hearing, Mr. Haymond's forensic expert provided uncontroverted testimony that all of the images at issue were thumbnail images found in the cellphone's "cache," a folder or database that could not be accessed without specialized software that was not present on the phone. *Id.* at 43a. The expert further explained that information can be automatically downloaded to a cellphone's cache and a user may or may not have viewed or accessed the images that are downloaded. *Id.* at 43a-44a. The images at issue lacked metadata and it was impossible to determine when the file was created or modified. *Id.* at 44a. Because the images were thumbnails, there would have been a second identical image in the cellphone's data if the user had clicked on the thumbnail. *Id.*

Notwithstanding this evidence, the district court found sufficient evidence to show by a preponderance of the evidence that Mr. Haymond knowingly possessed some of the images found in the cellphone's cache. The court was clear, however, that "[i]f this were a criminal trial and the Court were the jury, the United States would have lost." Pet. App. 68a.

Of the fifty-nine images at issue in the revocation hearing, forty-three images came from the cellphone's browser cache, three images came from malicious "ransomware" software that had been installed on the phone, and thirteen images came from the phone's gallery cache *Id.* at 42a-43a. The district court found insufficient evidence to show that Mr. Haymond knowingly possessed the forty-six images from the cellphone's browser cache and ransomware software. *Id.* at 58a. The court explained that the cellphone user would not necessarily view, access, or control images stored in the browser cache or images downloaded by ransomware software. *Id.* at 59a. Accordingly, in the absence of additional evidence to establish a volitional act, the court could not find knowing possession. *Id.* On the other hand, the district court found sufficient evidence to conclude that it was more likely than not that Mr. Haymond knowingly possessed the thirteen images from the gallery cache. *Id.* at 59a-66a. Relying on factual findings that the court of appeals later held to be clear error, the district court concluded that given the file location of the images there was evidence that Mr. Haymond took some volitional act in downloading, viewing, or saving those images. *Id.* at 66a.

The district court expressed significant misgivings about imposing an extended and mandatory term of imprisonment by operation of § 3583(k) and doing so without constitutional protections. See *infra* II; Pet.

App. 50a; Resp't App. 9a. But for the mandatory minimum five-year term of imprisonment, the district court explained, it "probably would have sentenced in the range of two years or less." Resp't App. 10a.

C. The Tenth Circuit's Decision

The Tenth Circuit affirmed in part and vacated in part Mr. Haymond's sentence. The court of appeals held that the district court had made a number of clearly erroneous factual findings related to the thirteen images found in the gallery cache of the smartphone. Pet. App. 6a-9a. The district court had cited testimony from Mr. Haymond's expert as evidence that Mr. Haymond took some volitional act that resulted in the images being on the phone. *Id.* But as the court of appeals explained, the expert testimony could not establish that Mr. Haymond saved, downloaded, or otherwise placed the photos on the phone. *Id.* Rather, the expert had testified that the presence of the photos in the gallery cache meant, at most, that the images were at some point accessible on the phone. *Id.*

After excluding the erroneous factual findings, the evidence only established that Mr. Haymond had nearly exclusive use and possession of the cellphone, that the images were accessible somewhere on the phone, and that the images were consistent with images from the original conviction. *Id.* at 9a. The court of appeals nonetheless concluded that there was sufficient evidence to show that Mr. Haymond knowingly possessed the images. *Id.* The court emphasized that it was a "close case" even under a preponderance standard and agreed it was possible that the images originated from an automatic process as opposed to a volitional act. *Id.* at 9a-10a.

However, the Tenth Circuit held that § 3583(k) violates the Fifth and Sixth Amendments. *Id.* at 15a. The court concluded that the last two sentences of § 3583(k) increase the mandatory minimum penalty in violation of the jury trial right as interpreted in *Apprendi*, 530 U.S. 466, *Alleyne* v. *United States*, 570 U.S. 99 (2013), and *United States* v. *Booker*, 543 U.S. 220 (2005). Under those cases, facts that increase the penalty for a crime are elements of the crime and must be found by a jury beyond a reasonable doubt. Pet. App. 15a-16a. The court of appeals also held that general principles of due process govern the procedures that must be afforded a defendant in a revocation hearing, in particular where a "grievous loss" could result. *Id.* at 19a n.1.

The Tenth Circuit explained that § 3583(k) unquestionably increases the minimum sentence to which a defendant may be subjected. In Mr. Haymond's case, the court noted when he was originally convicted by a jury, the conviction carried a potential term of imprisonment of zero to ten years. *Id.* at 20a. After the court found a supervised release violation that fell within § 3583(k), that potential term of imprisonment now ranged from five years to life. *Id.* Because a judge made the factual finding that triggered this increased mandatory minimum by a preponderance of the evidence, as opposed to a jury by a reasonable doubt, the court concluded that § 3583(k) violates the jury trial right. *Id.* at 20a-21a.

The government had argued before the court of appeals that *Apprendi*, *Alleyne*, and *Booker* did not apply to revocation proceedings. Pet. App. 16a-19a. The court rejected this argument, explaining that *Booker* had applied to sentencing proceedings, of which the revocation of supervised release was one component. *Id.* And although the revocation of supervised release

may not directly contemplate a "criminal prosecution" under the language of the Sixth Amendment, the court explained that it can indirectly implicate the Sixth Amendment if facts presented based upon a new alleged criminal act increase the sentencing range represented by the original offense of conviction. *Id.* at 19a n.1 ("[H]olding that the Sixth Amendment does not require particular procedures in a revocation hearing is not the same as holding that a defendant, once convicted of a crime, loses all Sixth Amendment rights during the time of imprisonment and supervised release."). Accordingly, the court emphasized that § 3583(k) cannot be excused from constitutional review simply because it is a revocation statute.

The Tenth Circuit also concluded § 3583(k) requires a term of imprisonment based upon a new offense and thus imposes a penalty that is at least in part punishment for the new criminal conduct. *Id.* at 23a. Using revocation as punishment, rather than as a rehabilitative tool, thus raised the same "serious constitutional questions" this Court avoided in *Johnson* v. *United States*, 529 U.S. 694, 700 (2000). The court of appeals also noted that § 3583(k)'s mandatory minimum stripped the revocation judge of discretion to impose punishment within a statutorily prescribed range. Pet. App. at 15a. "Discretion is key" in revocation cases as well as at original sentencing, the court held, relying on *Booker*. *Id.* at 16a.

As for the remedy, the court of appeals concluded that the last two sentences of § 3583(k) that impose the heightened unconstitutional penalty could be severed from the remaining provisions of § 3583 and the sentencing code. *Id.* 26a-28a. The court noted § 3583(k) was only added in 2006 and the invalidation of portions of the statute would have "no significant effect" on the sentencing code. *Id.* at 28a. Without

§ 3583(k), the penalties available for revocation would be governed by § 3583(e)(3), which ties the penalty to the original crime of conviction and does not raise an *Apprendi* issue. *Id.* at 27a-28a.

Judge Kelly dissented in part, disagreeing that any of the district court's factual findings were erroneous, but agreeing that there was sufficient evidence to establish that it was more likely than not that Mr. Haymond possessed child pornography. *Id.* at 29a-34a. Regarding the constitutional issues, Judge Kelly reasoned that the increased penalty triggered by § 3583(k) had no constitutional significance because a revocation proceeding is not a stage of the criminal prosecution. *Id.* at 31a-32a. On this view, Congress could provide for a mandatory lifetime term of reimprisonment based upon a violation of supervised release that is found by a judge applying a preponderance of the evidence standard.

The government moved for panel rehearing and rehearing en banc. The court of appeals denied rehearing. Pet. App. 70a. Judge Kelly voted for a rehearing before the panel, but no active judge voted for rehearing en banc. *Id.*

On remand, the district court imposed a sentence of time served for the supervised release violation, as Mr. Haymond had already been detained for approximately twenty-eight months following his arrest. See Judgment and Commitment at 2, *United States* v. *Haymond*, 08-CR-00201 (N.D. Okla. Feb. 14, 2018), ECF No. 266. Mr. Haymond is now on an additional twenty-four months of supervised released as imposed by the district court. *Id.* at 3.

SUMMARY OF THE ARGUMENT

Section 3583(k), a recent addition to the system of supervised release, is a peculiar feature of the supervised release statute. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 141(e)(2), 120 Stat. 587, 603 (amendments to § 3583(k) at issue in this case). It is the *only* provision of the various provisions governing supervised release that mandates revocation and a mandatory minimum term of imprisonment. It is the *only* provision that provides for an enhanced revocation penalty based upon the nature of the supervised release violation. And it is the *only* provision that permits the court to bypass the limits on reimprisonment set by § 3583(e)(3).

In this way, § 3583(k) is fundamentally out of step with the system of supervised release that the Court has considered in prior cases. As the Court warned in *Johnson* v. *United States*, "serious constitutional questions" related to the jury trial right necessarily would arise if the revocation process, in substance, imposes an aggravated penalty for the violation conduct. *Johnson*, 529 U.S. at 700. By mandating an aggravated penalty for a particular violation of supervised release, § 3583(k) cannot be viewed as a mere modification of the original sentence.

The jury trial issue that the Court avoided in *Johnson* can be resolved in this case by a straightforward application of the Court's precedents interpreting the jury trial right. Beginning with *Apprendi* and continuing through *Alleyne*, this Court has announced a firm rule when it comes to sentencing enhancements triggered by judicial fact finding: "When a finding of fact

alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne*, 570 U.S. at 114-15.

Section 3583(k) is one such unconstitutional sentencing enhancement. Mr. Haymond's original conviction for a Class C felony permitted a term of reimprisonment between zero and two years. 18 U.S.C. § 3583(e)(3). Because a court at a revocation hearing applying a preponderance of the evidence standard determined that Mr. Haymond committed a new crime, the court could disregard the statutory limits in § 3583(e)(3) and impose an enhanced and severe penalty: five years imprisonment at least and lifetime imprisonment at most. This enhanced penalty was not a mere matter of the district court's "administration" of a previous sentence. U.S. Br. 23-31. Rather, it was a clear violation of the jury trial right and fundamental notions of due process that will only further erode the role of the jury in adjudicating allegations of criminal wrongdoing.

The Solicitor General places heavy reliance on the historical practice and judicial precedent surrounding the revocation of parole and probation. U.S. Br. 31-43. But § 3583(k) has little in common with these historical revocation proceedings, where juries were not required as a matter of constitutional right. With revocation in the context of parole, probation, and most applications of supervised release, the court or parole authority is imposing a penalty that is authorized by the original conviction where the jury trial right applied. In contrast, § 3583(k) requires an enhanced penalty based upon new conduct that is not tethered to the original jury-authorized sentence.

And in the event the Court agrees that § 3538(k) is unconstitutional, the Solicitor General proposes a middle-ground remedy: empanel juries to make "any required findings" at a revocation hearing. *Id.* at 53. This remedy is impractical and inconsistent with congressional intent. Congress made no provision for the Solicitor General's proposal, which would only engender a host of constitutional and procedural questions. Rather, Congress intended for courts to exercise discretion in monitoring compliance with the conditions of supervised release. The most straightforward remedy in this case is to set aside § 3583(k) and to permit courts to continue to exercise that discretion within the statutory boundaries defined by § 3583(e)(3) and the original crime of conviction.

ARGUMENT

I. SECTION 3583(K) VIOLATES THE JURY TRIAL RIGHT BY ALTERING THE STATUTORY RANGE OF REIMPRISONMENT ON THE BASIS OF POST-CONVICTION JUDICIAL FACT FINDING

A. Section 3583(k) is distinct from the system of supervised release the Court considered in *Johnson*.

In defending the constitutionality of § 3583(k), the Solicitor General does not have the Court's decision in *Johnson* in his corner. U.S. Br. 39-43. As part of resolving an *ex post facto* challenge to an amendment to § 3583(h), the Court in *Johnson* treated supervised release revocation and reimprisonment as "part of the penalty for the initial offense" as opposed to "punishment for the violation of the conditions of supervised release." *Johnson*, 529 U.S. at 700. The Court emphasized that it was not "mere formalism to link the second prison sentence to the initial offense" because

"the gravity of the initial offense determines the maximum term of reimprisonment." *Id.* at 708. *Johnson* also recognized that any prison term imposed as a sanction for a violation of supervised release was to be "limited," *id.* at 712, because its purpose must only be "to assist individuals in their transition to community life." *Id.* at 709. The "use [of] the district courts' discretionary judgment" was paramount. *Id.*

In *Johnson*, the Court noted that it would "raise serious constitutional questions" if the court revoking supervised release and imposing a new term of imprisonment were punishing the defendant for the supervised release violation. *Id.* at 700. "Although such violations often lead to reimprisonment, the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Id.* In addition, there would be an issue of double jeopardy where the violations were "criminal in their own right" and could be separately prosecuted. *Id.*

Johnson thus suggests nothing more than that there is no constitutional issue related to the lack of a jury trial at a revocation proceeding *so long as* the revocation penalty is attributable to the initial offense. But in amending § 3583(k), Congress severed the link between the original crime of conviction and the authorized term of reimprisonment. Now, the available punishment in a revocation proceeding is tied directly to the nature of the new conduct that serves as the basis for the revocation. Section 3583(k)'s potential lifetime term of imprisonment makes impossible any return by a defendant to the community at all, and its mandatory five-year term of imprisonment strips district court judges of needed discretion to handle individual revocation cases. This raises the "serious constitutional questions" that the Court avoided in *Johnson*, in

particular the lack of a jury trial in a proceeding where the available punishment turns on whether the defendant has committed a new criminal offense.

B. Under a straightforward application of *Apprendi*, § 3583(k) is an unconstitutional invasion of the jury trial right.

The *Apprendi* rule governs this case and renders § 3583(k) constitutionally unworkable under the Fifth and Sixth Amendments. *Apprendi*, 530 U.S. at 490.[2] As with New Jersey's "hate crime" statute, § 3583(k) operates to increase both the minimum and maximum period of reimprisonment that would otherwise be available based upon the original Class C felony.

1. Section 3583(k) acts as a mandatory sentencing enhancement, increasing both the minimum and maximum term of reimprisonment.

In this case, the court was authorized on the basis of the jury's verdict to impose a term of supervised release to follow imprisonment of at least five years and at most life. 18 U.S.C. §§ 3583(a), (k).[3] The court was

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[2] While *Apprendi* and its progeny have cited the Fifth and Sixth Amendments in support of the jury trial right, Article III, § 2 applies with equal force in these cases to guarantee that "the trial of all crimes, except in cases of impeachment, shall be by jury." *See Callan* v. *Wilson*, 127 U.S. 540, 549 (1888) ("The word 'crime,' in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character."); *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968) ("Criminal contempt is a crime in the ordinary sense; it is . . . a public wrong.").

[3] Section 3583(k), besides imposing a mandatory term of reimprisonment that is the subject of this dispute, also sets the authorized term of supervised release for certain sex offenses. This

also authorized to revoke a term of supervised release if the court found by a preponderance of the evidence that Mr. Haymond violated a condition of supervised release. 18 U.S.C. § 3583(e)(3). As part of revoking supervised release, the court could require Mr. Haymond "to serve in prison all or part of the term of supervised release authorized" by the original criminal offense "without credit for time previously served on postrelease supervision." *Id.* This term of imprisonment (or, more precisely, "reimprisonment") would, however, be limited to not more than two years in prison because Mr. Haymond's conviction for possession of child pornography was a Class C felony. *Id.*

The term of reimprisonment the court could impose in a revocation proceeding on the basis of Mr. Haymond's criminal conviction was between zero and two years. In other words, the statutory minimum for *Apprendi* purposes was zero years and the statutory maximum was two years. See *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.") (emphasis omitted). The statutory range of zero to two years was based upon § 3583(e)(3) and the legislature's judgment as to severity of the original conviction. *Johnson*, 529 U.S. at 708 (noting that under § 3583(e)(3) "the gravity of the initial offense determines the maximum term of reimprisonment, just as it controls the maximum term of supervised release in the initial sentencing") (citation omitted).

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aspect of § 3583(k) and the length of the term of supervised release imposed at Mr. Haymond's original sentencing is not at issue here.

Section 3583(k) transformed the short term of reimprisonment between zero to two years that Mr. Haymond's original crime of conviction authorized into a lengthy and mandatory term of reimprisonment of five years to life. This increased the statutory minimum term of reimprisonment (the statutory floor) from zero years to five years and the statutory maximum term of reimprisonment (the statutory ceiling) from two years to life.[4] The new statutory range was triggered by factual findings made by a judge at the revocation hearing applying a preponderance of the evidence standard.

The operation of § 3583(k) at Mr. Haymond's revocation hearing is substantively indistinguishable from the operation of the various sentencing enhancements that the Court has struck down as part of the *Apprendi* line of cases. In those cases, if a court found that a defendant committed a crime in a particular fashion, it was authorized to impose a longer term of imprisonment. See *Apprendi*, 530 U.S. at 491; *Ring*, 536 U.S. at 592-93; *Booker*, 543 U.S. at 227-28. In the same way, § 3583(k) authorized a longer term of imprisonment—indeed, it mandated a five-year term—if the court determined that Mr. Haymond had violated the terms of supervised release in a particular fashion. See *Ap-*

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[4] Section 3583(k) does not explicitly mention life imprisonment, but states that the court shall "require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein." 18 U.S.C. § 3583(k). Without the exception in § 3583(e)(3) that limits reimprisonment based upon the class of the felony, the court is authorized to impose a term of reimprisonment equal to "all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release." 18 U.S.C. § 3583(e)(3). In Mr. Haymond's case, the maximum authorized term of supervised release was life. 18 U.S.C. § 3583(k).

prendi, 530 U.S. at 495 (noting that it was "unquestionably of constitutional significance" that the sentencing enhancement doubled the maximum sentence from ten years to twenty years). Accordingly, under a straightforward application of the *Apprendi* rule to this case, § 3583(k) was an unconstitutional invasion of the jury trial right because it "increase[d] the punishment above what is otherwise legally prescribed" by the jury's verdict. *Alleyne*, 570 U.S. at 108.

To be sure, the Court has not previously considered how to apply the *Apprendi* rule to supervised release revocation proceedings. But this is not the first time that the Court has been called upon to figure out how to preserve the "ancient guarantee" of the jury trial right "under a new set of circumstances." *Booker*, 543 U.S. at 237. The *Apprendi* rule itself emerged in response to new sentencing schemes where judges during sentencing would apply "sentencing factors" that exposed defendants to additional punishment. *Apprendi*, 530 U.S. at 483, 494. As with *Apprendi*, the analysis of the jury trial right here should be motivated "by the need to preserve Sixth Amendment substance" as opposed to "Sixth Amendment formalism." *Booker*, 534 U.S. at 237.

To take *Apprendi* at face value is to conclude that courts imposing a term of imprisonment in a supervised release revocation proceeding cannot engage in fact finding that increases the "prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490. Consistent with *Apprendi* and *Johnson*, Congress can provide for reimprisonment as a limited penalty for violation of the conditions of supervised release so long as the court in revoking supervised release has discretion to set the term of reimprisonment within a statutory range de-

termined by the original crime of conviction. But Congress cannot, as it has done here, mandate an aggravated penalty based upon facts that were never submitted to the jury. As the Court declared in *Blakely*, "[t]he Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State." *Blakely*, 542 U.S. at 313-14 (citation omitted).

The Solicitor General responds that *Apprendi* and its progeny recognize a distinction between "proceedings relevant to the *imposition* of a sentence and proceedings relevant to the *administration* of a sentence," where the *Apprendi* rule applies to the former but not the latter category. U.S. Br. 23-24. Revocation of supervised release, in this view, is merely part of the administration of a sentence.

But in applying the *Apprendi* rule, the Court has cautioned against such labeling exercises. See *Ring*, 536 U.S. at 602 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."). And even if the Court has somehow implicitly recognized this distinction, the revocation of supervised release must be viewed as the imposition of a sentence. Supervised release is, of course, a component of the sentence for the original crime of conviction. See 18 U.S.C. § 3583(a) (referring to supervised release as a "part of the sentence"); 18 U.S.C. §§ 3583(c), (d)(1), (d)(2), (e) (instructing courts, when imposing a term of supervised release, setting the conditions of supervised release, and terminating, extending, or revoking supervised release, to consider the

§ 3553(a) factors, which are "[f]actors to be considered in imposing a sentence," 18 U.S.C. § 3553(a)); U.S. Sentencing Guidelines Manual Ch. 7 (U.S. Sentencing Comm'n 2018) ("USSG") (setting forth policy statements regarding violations of supervised release). And the revocation hearing is, in many ways, a reenactment of the original sentencing proceeding. The court hears evidence about the relevant factors under § 3553(a), consults the Sentencing Guidelines to determine the recommended range of imprisonment, and makes an individualized determination about the appropriate term of imprisonment. USSG §§ 7B1.1-1.4.

It is very odd to say that the court is merely administering the original sentence when § 3583(k) revokes supervised release and requires that it reincarcerate a defendant for a mandatory minimum period that is longer than the original sentence itself. Such a mandatory minimum constitutes a *substantial* term of imprisonment and leaves a defendant open to a separate criminal prosecution for the same offense. The decision is no mere administrative matter and has little in common with, for example, the decision to impose consecutive and concurrent sentences after a trial where a defendant has just had the benefit of a jury and the beyond a reasonable doubt standard. See *Oregon* v. *Ice*, 555 U.S. 160, 164-66 (2009); U.S. Br. 30-31.

2. Section 3538(k) imposes severe penalties on the basis of the limited procedural protections available in a revocation proceeding.

A component of the jury trial right described in *Apprendi* is due process. *Apprendi*, 530 U.S. at 478; see also Pet. App. 19a-20a n.1 (explaining that even if a revocation proceeding is not a "criminal prosecution," a Fifth Amendment violation occurs because § 3583(k)

inflicts a "grievous loss" and due process requires "flexibility"). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). As written, the penalties and procedural guarantees in § 3583(k) are incompatible with basic notions of due process, which further supports the application of the *Apprendi* rule in this context. "Fundamental fairness," which is "the touchstone of due process," would not permit a citizen to face lifetime imprisonment by nothing more than judicial fact finding under a preponderance of the evidence standard. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 790 (1973).

First, § 3583(k) exposes defendants to severe penalties. In the due process context, what procedural protections are due depends, in part, on the extent to which an individual will be "condemned to suffer grievous loss." *Morrissey*, 408 U.S. at 481. In a typical revocation proceeding, the maximum term of reimprisonment that the court could impose on a defendant like Mr. Haymond is two years because his original conviction was a Class C felony. 18 U.S.C. § 3583(e)(3); see also 18 U.S.C. § 3559 (classification of offenses). But § 3583(k) mandates a minimum five year term of imprisonment and authorizes a maximum lifetime term of imprisonment. 18 U.S.C. § 3583(k).

A lifetime term of imprisonment in the federal prison system where there is no possibility of parole is "the second most severe [sentence] known to the law," surpassed only by the death penalty. *Harmelin* v. *Michigan*, 501 U.S. 957, 996 (1991); see also *Graham* v. *Florida*, 560 U.S. 48, 74 (2010) ("A sentence of life imprisonment without parole . . . cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State

makes an irrevocable judgment about that person's value and place in society."). Indeed, this maximum lifetime term of imprisonment surpasses the statutory maximum sentence for Mr. Haymond's first conviction for possession of child pornography and would surpass the maximum sentence if he were charged with possession a second time. See 18 U.S.C. § 2252(b)(2) (ten-year maximum for first conviction and twenty-year maximum for second conviction).

Second, § 3583(k) mandates these significant terms of imprisonment in the procedural context of a revocation hearing where there is no jury and a defendant is not afforded the "full panoply of rights" applicable to a criminal trial. *Morrissey*, 408 U.S. at 480; see also *Middendorf* v. *Henry*, 425 U.S. 25, 51 (1976) (Marshall, J., dissenting) ("It is inconceivable, for example, that this Court could conclude that a defendant in a general court-martial proceeding, where sentences as severe as life imprisonment may be imposed, is not entitled to the same protection our Constitution affords a civilian defendant facing even a day's imprisonment."). The Federal Rules of Evidence and the exclusionary rule, for example, do not apply at revocation. See *United States* v. *Bari*, 599 F.3d 176, 179 (2d Cir. 2010) (per curiam); *United States* v. *Charles*, 531 F.3d 637, 640 (8th Cir. 2008).

Critically, the burden of proof that the government must meet to trigger § 3583(k) is a preponderance of the evidence, an evidentiary standard that is more at home in a civil proceeding than a criminal proceeding where years of imprisonment are at stake. See *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) (explaining that preponderance of the evidence standard is appropriate "in a civil suit between two private parties for money damages" because "we view

it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor"). Indeed, it is a lower standard of proof than that which applies in civil commitment proceedings for sexually dangerous federal prisoners. See *United States* v. *Comstock*, 560 U.S. 126, 130 (2010) (noting that government must prove its claims by "clear and convincing evidence").

Mr. Haymond's case is illustrative of the impact of the lower standard of proof. A district court and court of appeals have examined the factual record presented at the revocation hearing. Both concluded that this was a "close case" under a preponderance of the evidence standard. Pet. App. 9a.[5] The district court went further and stated that "if the court were to decide this case under the standard of beyond a reasonable doubt . . . the government would not have been able to bear that burden of proof." 3 C.A. App. 150.

Third, courts and parole boards historically maintained discretion and flexibility in supervising a defendant's release and making determinations related to revocation. In evaluating the due process protections that apply to revocation proceedings, this Court has repeatedly emphasized the preeminent role of discretion in those systems. See *Gagnon*, 411 U.S. at 784 (noting that a probation and parole officer was "entrusted traditionally with broad discretion to judge the progress of rehabilitation"); *Black* v. *Romano*, 471 U.S. 606, 611 (1985) ("In identifying the procedural require-

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[5] In dissent, Judge Kelly concurred with the majority that the case satisfied the preponderance of the evidence standard, but did not express a view on the strength of the evidence. Pet. App. 29a-31a.

ments of due process, we have observed that the decision to revoke probation typically involves . . . a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation."); *Burns* v. *United States*, 287 U.S. 216, 220 (1932) ("To accomplish the purpose of the [Federal Probation Act of 1925], an exceptional degree of flexibility in administration is essential."). The courts of appeals have announced the same principle in describing supervised release. See *United States* v. *Huerta-Pimental*, 445 F.3d 1220, 1224 (9th Cir. 2006) ("[R]evocation is, and always has been fully discretionary."); *United States* v. *Cordova*, 461 F.3d 1184, 1188 (10th Cir. 2006) (same); *United States* v. *Hinson*, 429 F.3d 114, 117 (5th Cir. 2005) (same). As the Tenth Circuit explained in the decision below, "discretion is key." Pet. App. 16a. Section 3583(k) is the antithesis of discretion and flexibility because it mandates a hefty term of imprisonment based upon a type of supervised release violation that Congress has singled out for punitive treatment.

3. Section 3583(k) is a historical outlier and distinct from prior systems of parole and probation.

Another principal argument from the Solicitor General's asserts that *Apprendi* has nothing to say about revocation proceedings because historically juries have not played a role in the decision to revoke parole and probation. U.S. Br. 31-43. But parole and probation are relatively recent and oft-changing systems that were unknown to the Framers. By contrast, the Framers implemented a jury trial right at a time when "the English trial judge of the later Eighteenth Century had very little explicit discretion in sentencing" and "[t]he substantive criminal law tended to be sanction specific." *Apprendi*, 530 U.S. at 479.

Parole, for example, did not come to the United States until 1876 in New York at the Elmira Reformatory and the federal government did not adopt a parole statute until 1910. See Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958, 976, 984 (2013). Probation has a similarly thin historical grounding, with Congress passing the first federal probation statute in 1925. *Id.* at 986. Because probation and parole were considered to constitute nothing more than an "act of grace," *Escoe* v. *Zerbst*, 295 U.S. 490, 492 (1935), the practice developed few procedural safeguards. For example, the defendant who was placed on parole remained in the custody of the warden of the penitentiary from where he was released. His status was "analogous to those of an escaped convict," and the parole board "was authorized at any time during his term of sentence in its discretion to revoke the order and terminate the parole." *Anderson* v. *Corall*, 263 U.S. 193, 196-97 (1923).

Parole revocation penalties could not exceed reimprisonment *for the remainder of the original sentence*, with no credit for any time out on parole. See Parole Act, Pub. L. No. 61-269, § 6, 36 Stat. 819, 820 (1910) (stating that the parole board could "revoke" parole and require the prisoner to "serve the remainder of the sentence originally imposed"); *Anderson*, 263 U.S. at 195-96 (same); Doherty, *supra*, at 1005-06.[6] The penalty for revocation of probation was similarly tethered

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[6] In addition, until at least 1967, when a federal parolee was charged with a new criminal offense, the parole board would wait to issue a warrant and revoke parole until the new charges were resolved. *See* Notes, *Parole Revocation in the United States*, 56 Geo. L.J. 705, 712 (1968). The board's policy was based upon constitutional concerns, as the board was reluctant to revoke parole when a parolee could later be acquitted and wished to afford the

to the original crime of conviction. If a court decided to revoke probation, the court could impose the sentence that had been suspended by the period of probation. See Probation Act of 1925, Pub. L. No. 68-596, § 2, 43 Stat. 1259, 1260 (the court "may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed"); *Burns*, 287 U.S. at 221 (same); 18 U.S.C. § 3565(a)(2) (current revocation procedure for probation). In sum, historically there was no direct role for the jury to play at a revocation hearing for parole or probation because the court or the parole authority was simply imposing the terms of the original sentence that the original jury's verdict supported. For this reason, there would be no right to a jury determination of the facts underlying the revocation decision.

Supervised release has an even shorter history, emerging as part of the Sentencing Reform Act of 1984. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, sec. 212(a), § 3583, 98 Stat. 1987, 1999-2000. Supervised release was meant to be a form of "post-confinement supervision," *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991), that would "improve the odds of a successful transition from the prison to liberty." *Johnson*, 529 U.S. at 708-09; see also *United States* v. *Johnson*, 529 U.S. 53, 59 (2000) ("Supervised release fulfills rehabilitative ends, distinct from those served by incarceration."). Supervised release was not a form of "conditional liberty," *Morrissey*, 408 U.S. at 480, where a defendant was released into the community on the condition that he abide by rules and regulations. A defendant who began a term of supervised release had completed his term of imprisonment and there was no pending term that he

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parolee "every opportunity to use his adversary rights in the criminal defense." *Id.*

could resume serving (as in the case of parole) or begin serving (as in the case of probation). See S. Rep. No. 98-225, at 58 (1983) ("A prisoner has completed his prison term when released even if he is released to serve a term of supervised release.").

Because supervised release served rehabilitative ends and defendants had already completed a term of imprisonment, reimprisonment as a penalty was historically modest, incidental to the supervision of the defendant, and limited by the gravity of the initial offense. See, *e.g.*, *Johnson*, 529 U.S. at 700-01, 708; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1006, 100 Stat. 3207, 3207-6 to -7 (introducing reimprisonment as a penalty for supervised release revocation and limiting reimprisonment to the defendant's term of supervised release); Sentencing Act of 1987, Pub. L. No. 100-182, § 25, 101 Stat. 1266, 1272 (adding further limitations on reimprisonment based upon classification of original felony); see also *United States* v. *Gavilanes-Ocaranza*, 772 F.3d 624, 627 (9th Cir. 2014) ("[The] conditions may not be made more severe, nor may the defendant's term of incarceration after his violation be made more onerous by any act adopted after he was sentenced.") (quoting *United States* v. *Paskow*, 11 F.3d 873, 881 (9th Cir. 1993)).[7] Indeed,

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[7] The initial system of supervised release did not provide a mechanism for imposing a new prison term. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, sec. 212(a), § 3583, 98 Stat. 1999. For technical violations, the release conditions could "be made more severe." S. Rep. No. 98-225, at 58. For serious violations, the defendant could "depending on the circumstances of the case, be punished for contempt of court or be held pending trial if the violation is a new criminal offense." *Id.* Since the 1960s, incarceration for contempt of court was limited to no more than six months unless the defendant was given a jury trial. See *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966); *Bloom*, 391 U.S. 194; *Frank* v. *United States*, 395 U.S. 147 (1969). Finally, if the

under the current iteration of the statute, the most dangerous and violent felons in the federal criminal system who are serving a term of supervised release cannot be reimprisoned for more than five years. 18 U.S.C. § 3583(e)(3) (maximum term for Class A felony). Section 3583(k) breaks with this tradition of limited penalties and violates *Apprendi* by using new criminal conduct to justify an aggravated penalty (here, both ceiling and floor) that far exceeds the limited penalty which could be imposed based upon the original crime of conviction, see *infra* I.B.2

4. Section 3583(k) encourages further erosion of the role of the jury trial right.

The Solicitor General's argument that *Apprendi* does not apply to "postjudgment facts" that "do not exist at the time of indictment or sentencing" proves too much. U.S. Br. 26. If *Apprendi* ceases to apply when the jury is disbanded and the sentence is imposed, Congress could constitutionally enact provisions similar to § 3583(k) for drug dealers, bank robbers, or any other class of offenders that fall into disfavor. Prosecutors could seek lifetime terms of imprisonment for recidivists on the basis of minimal evidence. Cases like this one where the government could not meet the beyond a reasonable doubt standard in a jury trial could be resolved in the government's favor under a preponderance of the evidence standard. Supervised release has already become a *de facto* addition to a defendant's sentencing regimen while conditions imposed have become onerous and complex. See U.S. Sentencing Comm'n, *Federal Offenders Sentenced to*

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defendant committed a more serious violation, Congress noted that it "should be dealt with as a new offense." S. Rep. No. 98-225, at 58.

Supervised Release, at 4 (2010) (noting that from 2005 to 2009, sentencing courts imposed supervised release in 99.1% of cases where it was not statutorily required); 18 U.S.C. § 3583(d); United States Courts, Form AO-245B Judgment in a Criminal Case (Revised Sept. 2008) (listing the five mandatory conditions and thirteen standard conditions that a typical defendant must follow while on supervised release).

The supervised release revocation statute thus could render many recidivist criminal statutes dead letter and revocation proceedings could become a shadow court system where significant terms of imprisonment are doled out without regard to the historic role of the jury in determining guilt. In such a system, the "jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping." *Jones* v. *United States*, 526 U.S. 227, 243-44 (1999).

II. THE PROPER REMEDY FOR § 3583(K)'S CONSTITUTIONAL INFIRMITIES IS TO HOLD THE OFFENDING PORTIONS OF THE STATUTE UNENFORCEABLE

In the event this Court agrees that § 3583(k) is incompatible with *Apprendi*, the Solicitor General argues that the proper remedy is to "permit enforcement of § 3583(k) so long as the statutory procedures are satisfied" and a jury is empaneled to make "any required findings beyond a reasonable doubt." U.S. Br. 53. The Solicitor General's proposed remedy would create more problems than it would solve.

First, holding the last two sentences of § 3583(k) unenforceable and leaving the rest of the statutory structure of supervised release untouched would be more consistent with congressional intent. See *Booker*, 543 U.S. at 258-59 ("[W]e must retain those portions of the

Act that are (1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objectives in enacting the statute.") (quoting *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987)).

Congress intended that judges, not juries, supervise defendants who have completed a term of imprisonment. *Johnson*, 529 U.S. at 697 (noting that supervised release is a "form of postconfinement monitoring overseen by the sentencing court"). The text of the supervised release statute is clear that courts, and courts alone, determine whether to, among other things, revoke supervised release and sanction a defendant for failure to comply with its terms. *E.g.*, 18 U.S.C. § 3583(e) ("The court may . . . terminate a term of supervised release . . . extend a term of supervised release . . . [or] revoke a term of supervised release . . . ."). "[T]he words 'the court' mean 'the judge without the jury,' not 'the judge working together with the jury.'" *Booker*, 543 U.S. at 249.

Empaneling a jury in connection with a revocation proceeding to make "any required findings," U.S. Br. 53, is a "system far more complex than what Congress could have intended." *Booker*, 543 U.S. at 254; see also *United States* v. *Jackson*, 390 U.S. 570, 580 (1968) ("It is one thing to fill a minor gap in a statute . . . . It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality."). Moreover, engrafting jury trial requirements to the current revocation system would transform the focus of supervised release revocation proceedings from issues of transition and rehabilitation overseen by a judge acting with full discretion to address a defend-

ant's individual needs to an adversarial setting promoted by prosecutors seeking reimprisonment as their primary objective. Prison would no longer be "a last resort," *Gagnon*, 411 U.S. at 785, it would be the only goal. Applying *Booker*'s words, it would "destroy the system" of supervised release. *Booker*, 543 U.S. at 252.

To be sure, Congress's intent in enacting § 3583(k) may well have been to deter and to punish more severely recidivist possessors of child pornography. U.S. Br. 54.[8] But Congress has already done so. The penalties that are already available for the enumerated offenses in § 3583(k) are substantial, with many of the offenses imposing significant mandatory minimum terms of imprisonment. *E.g.*, 18 U.S.C. § 1201(g) (twenty years imprisonment); 18 U.S.C. § 2241(c) (thirty years imprisonment); 18 U.S.C. § 1591(b)(1) (fifteen years imprisonment), (b)(2) (ten years imprisonment). What Congress may not do is to exceed even the maximum penalty for recidivist crimes of this nature by exposing a recidivist to a life sentence through

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[8] The mandatory penalties imposed by § 3583(k) were largely based upon assumptions about the recidivism risk posed by non-contact sexual offenders that are contradicted by empirical data. Several empirical studies have cast "serious doubt on the existence of a substantial relationship between the consumption of child pornography and the likelihood of a contact sexual offense against a child." *United States* v. *Apodaca*, 641 F.3d 1077, 1086 (9th Cir. 2011) (Fletcher, J., concurring); *see also* U.S. Sentencing Comm'n, *2012 Report to the Congress: Federal Child Pornography Offenses* 12-13, 293, 299-310 (2012), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf (noting that penalty ranges for sexual offenses assume a high risk of recidivism but finding in a study of released offenders that the rate of "sexual recidivism" measured by arrests or convictions for new sexual offenses was 7.4% and the rate of "general recidivism" was consistent with the overall population of offenders).

the expediencies of revocation proceedings. See *infra* I.B.1-2.

On the other hand, striking down portions of § 3583(k) would not frustrate or interfere with Congress' basic purpose in enacting supervised release to "assist individuals in their transition to community life." *Johnson*, 529 U.S. at 709; see also *Booker*, 543 U.S. at 250-51 (explaining that advisory guidelines would continue to serve Congress' "basic statutory goal" of diminishing sentencing disparity and promoting uniformity in sentencing). In particular, courts would continue to have the discretion to revoke supervised release based upon the failure to comply with its conditions and impose a term of reimprisonment to be followed by an additional term of supervised release. 18 U.S.C. §§ 3583(e)(3), (h). This was substantially the system of supervised release that existed from 1986—when Congress added a provision to § 3583 that permitted a court to revoke supervised release and order a term of reimprisonment—until 2006 when Congress added the portions of § 3583(k) at issue in this case.

Second, striking down targeted portions of § 3583(k) would be consistent with the Court's approach in prior *Apprendi* cases. In *Booker*, the Court invalidated two portions of the Sentencing Reform Act and made the guidelines system advisory as a remedy for the Act's infringement of the jury trial and due process rights. *Booker*, 543 U.S. at 259. The Court considered as an alternative remedy whether to "engraft" the jury trial requirement onto the guidelines. *Id.* at 246. But there, the Solicitor General argued and the Court held that such a system would have raised difficult questions of how a jury would find all the offense and offender related facts that are part of the guidelines calculation. *Id.* at 254-55. Here, the Court faces a similar

Booker dilemma: whether to excise portions of the supervised release statute and keep the bulk of the statutory structure intact or amend the statute to require amorphous jury trial proceedings that Congress has not authorized. The same answer should apply.

In contrast, the remedy the Court imposed in *Southern Union* and *Cunningham* is distinguishable. U.S. Br. 52-53. In *Southern Union*, it was a sensible and workable constitutional fix to have a jury *that would already be empaneled for a criminal trial* make factual findings that set the maximum criminal fine. *S. Union Co.* v. *United States*, 567 U.S. 343, 360 (2012) (holding that the *Apprendi* rule applies to facts that increase the maximum criminal fine). Here, there is no jury ready and waiting to make factual determinations at a revocation hearing. In *Cunningham*, the Court left it to the California legislature to decide whether to modify the system to retain determinate sentencing or give judges discretion at sentencing. *Cunningham* v. *California*, 549 U.S. 270, 293-94 (2007). One possible solution the Court suggested would be to modify the law to have juries already empaneled make additionalfactual determinations that trigger an enhanced sentence.

Finally, empaneling a jury at a revocation hearing to make "required findings beyond a reasonable doubt" would raise a host of constitutional and procedural questions. U.S. Br. 53. The Solicitor General does not specify what the "required findings" would be in a revocation proceeding under § 3583(k). Presumably, the findings relate to whether a defendant has "commit[ed] any criminal offense" enumerated in the statute "for which imprisonment for a term longer than 1 year can be imposed." But such a solution may violate double jeopardy protections if a jury decides that a defendant has committed a new criminal offense and a

subsequent prosecution is brought for the same offense. See *United States* v. *Dixon*, 509 U.S. 688, 695-96 (1993). Courts have previously rejected double jeopardy challenges in the context of a revocation hearing precisely because the punishment imposed is not punishment for the new criminal conduct. *Johnson*, 529 U.S. at 700 (citing cases). But if a revocation hearing begins to take on the appearance of a criminal trial related to the new criminal conduct, this undermines the reasoning of those decisions and suggests that double jeopardy should apply. The Solicitor General also fails to explain whether the "full panoply of rights" applicable to a criminal trial apply to the revocation trial that is proposed. *Morrissey*, 408 U.S. at 480.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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January 18, 2019

No. 17-1672

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANDRE RALPH HAYMOND

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Respondent fails to supply a coherent rationale for facially invalidating the revocation provisions of 18 U.S.C. 3583(k). He expressly acknowledges (Br. 16-17) that a court may revoke a defendant's supervised release and reimprison him based solely on a judicial finding by a preponderance of the evidence. Yet he identifies no logical distinction between Section 3583(k) and the supervised-release provisions whose constitutionality he recognizes. He cannot explain why those parallel provisions of the same statute should be viewed as a constitutional baseline that Section 3583(k) "enhance[s]," Br. 12; why any such "enhancement" would trigger a jury-trial right in a proceeding that "arises *after* the end of the criminal prosecution," *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972) (emphasis added); or why five years of reimprisonment for violating the conditions of his ten-year term of supervised release was unconstitutional. His characterization of Section 3583(k) as punishing a new criminal

offense, rather than the one for which supervised release was imposed, runs counter to *Johnson* v. *United States*, 529 U.S. 694, 700 (2000), and relies on the specter of unrealistically excessive reimprisonment terms that the law would not allow. And his insistence that it would make no sense to remedy the asserted violation of his jury-trial right by actually providing him with a jury trial serves only to illustrate that no such violation occurred. The court of appeals' judgment should be reversed.

I. RESPONDENT'S REIMPRISONMENT UNDER 18 U.S.C. 3583(k) WAS CONSTITUTIONALLY VALID

It is common ground that respondent's conviction following a jury trial authorized not only the imposition of his ten-year term of supervised release, but also revocation and reimprisonment of supervised release under 18 U.S.C. 3583(e)(3)—*without* any further findings by a jury. For the same reasons that the jury's verdict authorized revocation and reimprisonment based on judicial findings under Section 3583(e)(3), it likewise authorized revocation and reimprisonment based on judicial findings under Section 3583(k).

A. The Jury-Trial Right Does Not Apply To The Revocation Of Respondent's Supervised Release And His Resulting Reimprisonment

As the government's opening brief explained (at 4-14, 23-43), for a federal crime, a jury verdict of guilt (or a guilty plea) authorizes the court to impose a term of supervised release to follow imprisonment, which inherently includes the possibility of postjudgment revocation and reimprisonment based on judicial factfinding. Respondent not only declines to dispute that; he affirmatively agrees with it.

1. Respondent acknowledges that the district court in his case "was authorized on the basis of the jury's verdict to impose a term of supervised release"; that it "was also authorized to revoke a term of supervised release *if the court found by a preponderance of the evidence* that [he] violated a condition of supervised release" under 18 U.S.C. 3583(e)(3); and that as "part of revoking supervised release," the court could require a "term of imprisonment (or, more precisely, 'reimprisonment')." Resp. Br. 16-17 (emphasis added). And respondent recognizes (Br. 19) that such revocation and reimprisonment would *not* violate the jury-trial right as interpreted in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

Respondent's acknowledgment of those points—which are the crux of this case—accords with this Court's longstanding precedent. The Court has repeatedly held that the jury-trial right does not extend to postjudgment proceedings—even when they result in new or additional imprisonment—because such proceedings are "not part of a criminal prosecution." *Morrissey*, 408 U.S. at 480; see *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973). Respondent may dispute whether the relevant decisions, which addressed probation and parole, are directly controlling in the analogous context of supervised release. But, at bottom, he accepts the basic principle that revocation of supervised release and reimprisonment do not generally require a jury finding beyond a reasonable doubt.

2. To the extent that respondent tries to justify a novel expansion of the jury-trial right to postjudgment proceedings like the one here, those efforts disregard not only precedent, but the text and history of the Sixth Amendment as well. Respondent characterizes (Br. 20) the difference between imposition of a sentence in a

criminal judgment (to which the jury-trial right applies) and administration of a sentence after judgment (to which it does not) as a mere "labeling exercise[]." But his characterization gives short shrift to the operative text of the Sixth Amendment, which guarantees the jury-trial right only during "criminal prosecutions." U.S. Const. Amend. VI; see, *e.g.*, *Morrissey*, 408 U.S. at 480. And Article III's jury-trial right, which respondent mentions in passing (Br. 16 n.2), reaches no further than the Sixth Amendment's. See, *e.g.*, *United States* v. *Wood*, 299 U.S. 123, 142 (1936).

The history of the jury-trial right likewise undermines respondent's position. See *Southern Union Co.* v. *United States*, 567 U.S. 343, 353 (2012) ("[T]he scope of the constitutional jury right must be informed by the historical role of the jury at common law.") (citation omitted). Respondent identifies no precedent for post-judgment jury trials to determine a defendant's compliance with the conditions of a sentence. He instead expressly recognizes (Br. 27) that, historically, "there was no direct role for the jury to play at a revocation hearing for parole or probation." Respondent's ten-year period of supervised release, however, is not meaningfully different from a ten-year period of automatic parole. See *Morrissey* 408 U.S. at 477 ("Under some systems, parole is granted automatically after the service of a certain portion of a prison term."). Such conditional liberty can be revoked, and reimprisonment ordered, without the jury findings beyond a reasonable doubt that respondent insists are required here. See, *e.g.*, *id.* at 480, 484, 489.

This Court has refused to "cut the [*Apprendi*] rule loose from its moorings" by extending it to matters that "ha[ve] not traditionally belonged to the jury." *Oregon*

v. *Ice*, 555 U.S. 160, 172 (2009). It should similarly refuse to do so here. Although respondent observes (Br. 25-29) that supervised release differs in certain respects from its "precursor" systems of parole and probation, he identifies no difference that would justify expanding the jury-trial right to the revocation of his supervised release. *Johnson*, 529 U.S. at 710. All three are systems of conditional liberty that involve out-of-prison supervision, based on a criminal conviction, where breaching trust by violating the release conditions can lead to imprisonment. See U.S. Br. 31-35. This Court has accordingly considered parole reimprisonment as the proper analogue for supervised-release reimprisonment, see *Johnson*, 529 U.S. at 701; any analogy to a proceeding for contempt of court (Resp. Br. 28 n.7), in which criminal penalties are imposed in the first instance *without* any prior criminal conviction, is inapposite. Indeed, the Court in *Johnson* viewed the treatment of "postrevocation sanctions as part of the penalty for the initial offense" in the context of supervised release to have been "all but entailed" by a summary affirmance in the context of parole. 529 U.S. at 700-701.

B. Respondent's Reimprisonment Under Section 3583(k) Was Indistinguishable From Undisputedly Constitutional Reimprisonment Under Section 3583(e)(3)

The application of Section 3583(k), rather than Section 3583(e)(3), to respondent's revocation proceeding, long after his criminal prosecution ended, did not entitle him to a second jury trial. Just as respondent's original conviction by a jury beyond a reasonable doubt authorized later application of Section 3583(e)(3), it also authorized later application of Section 3583(k).

1. Reimprisonment under Section 3583(k), like reimprisonment under Section 3583(e), is authorized by the jury's verdict

Respondent recognizes (Br. 19) that *Apprendi* allows for revocation of supervised release and reimprisonment under Section 3583(e)(3), which authorizes reimprisonment for up to five years depending on the classification of a defendant's offense of conviction. He asserts (Br. 16), however, that the "*Apprendi* rule governs" and facially invalidates the revocation provisions of Section 3583(k). The latter position cannot be squared with the former, and it reflects a misunderstanding of *Apprendi*.

The *Apprendi* rule is grounded in the Sixth Amendment. See 530 U.S. at 476-478. Under that rule, any fact, other than the fact of a prior conviction, "that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne* v. *United States*, 570 U.S. 99, 103 (2013); see, *e.g.*, *United States* v. *Booker*, 543 U.S. 220, 231 (2005). The rule is inapplicable at a revocation proceeding that involves Section 3583(k) for the same reason that it is inapplicable at a proceeding that involves Section 3583(e)(3)—in neither case is the proceeding part of a "criminal prosecution[]" under the Sixth Amendment. Instead, the criminal prosecution ended with the imposition of a sentence that *authorized* the later revocation proceeding.

Facts found by a district court in a revocation proceeding do not "increase the penalty," *Alleyne*, 570 U.S. at 103, to which a defendant is exposed by the jury's verdict. Instead, "supervised release, and the subsequent possibility of reimprisonment after a violation of that release, is a part of the *original* sentence imposed

by the sentencing court following a defendant's conviction by a jury." *United States* v. *McIntosh*, 630 F.3d 699, 703 (7th Cir.) (emphasis added), cert. denied, 563 U.S. 951 (2011). Respondent acknowledges (Br. 16-17) as much with respect to reimprisonment under Section 3583(e)(3). It is no less true for Section 3583(k). As the government has explained (Br. 35-43), a sentence to a term of supervised release following a conviction like respondent's inherently incorporates the possibility of revocation and reimprisonment under Section 3583(k), in the same way that it incorporates the possibility of revocation and reimprisonment under Section 3583(e)(3). Respondent offers no explanation for why such a sentence would incorporate one subsection of Section 3583, but not another.

2. Section 3583(k) is not an "enhancement" of Section 3583(e)

Respondent nevertheless asserts (Br. 19-20) that application of Section 3583(k) requires a jury to find the facts underlying a supervised-release violation pursuant to *Apprendi*, on the theory that Section 3583(k) "mandate[s] an aggravated penalty based upon facts that were never submitted to the jury." To the extent that respondent would characterize *any* term of reimprisonment following supervised-release revocation as an "aggravated penalty" requiring a separate jury finding, his position—a position that would appear to invalidate every one of the many thousands of annual revocations in federal and state systems, see Pet. 27; States Amici Br. 13-14—cannot be squared with his recognition that a term of reimprisonment *can* be ordered "based upon facts that were never submitted to the jury" under Section 3583(e)(3). And to the extent that respondent is characterizing reimprisonment under

Section 3583(k) as an "aggravated penalty" *as compared to* reimprisonment under Section 3583(e)(3), that characterization is both irrelevant and incorrect.

a. Respondent's view that Section 3583(k) is an enhancement of Section 3583(e) rests on the faulty premise that reimprisonment under Section 3583(e)(3) is part of the baseline penalty authorized by the jury verdict, while reimprisonment under Section 3583(k) is not. But respondent never explains why the jury's verdict authorizes only *some* of the applications of Section 3583. Nor does he explain why, even if Section 3583(k) *could* be characterized as an aggravated version of Section 3583(e)(3) that requires additional factfinding (but see pp. 10-11, *infra*), Section 3583(k)'s application would trigger a requirement of a jury finding beyond a reasonable doubt in the postjudgment context—that is, "after the end of the criminal prosecution," *Morrissey*, 408 U.S. at 480.

Respondent emphasizes (Br. 18-21) that Section 3583(k) authorizes a longer term of reimprisonment than Section 3583(e)(3) does. But nothing in the *Apprendi* line of cases suggests that alternative ranges of imprisonment, applicable in the same context, might require *different* standards of proof. The fundamental teaching of *Apprendi* is that all elements of a crime that affect the range are subject to the *same* requirement of proof. See, *e.g.*, *Alleyne*, 570 U.S. at 113. In a criminal prosecution, that requirement is proof beyond a reasonable doubt to a jury, which applies regardless of the particular range of imprisonment; an assault punishable by 0-2 years of imprisonment and a drug crime punishable by 10-20 years of imprisonment must both meet that standard. The question here, however, is whether revocation of respondent's supervised release *is* a criminal

prosecution, subject to the Sixth Amendment's jury-trial requirement, in the first place. As respondent recognizes with respect to Section 3583(e)(3), it is not.

The Court in *Morrissey* "emphasize[d]" that it had "no thought to equate" a parole-revocation hearing "to a criminal prosecution in any sense," 408 U.S. at 489, without any suggestion that the jury-trial right's application would be different for a defendant facing revocation of, say, a 20-year parole term as opposed to a one-year parole term. See, *e.g.*, *id.* at 480 (noting that a "returnee may face a potential of substantial reimprisonment"). It is irrelevant that Section 3583(k)—like 18 U.S.C. 3583(g), which applies to certain repeated firearm and drug violations—requires the judge to order revocation and reimprisonment, whereas Section 3583(e)(3) allows the judge to decline. See Resp. Br. 18, 20. If supervised-release revocation were a proceeding in which a jury-trial right applied, then a fact triggering a mandatory term of imprisonment of even one day would require a jury finding beyond a reasonable doubt. See *Alleyne*, 570 U.S. at 117. But mandatory reimprisonment for a particular term does not in itself give rise to a jury-trial right that would not otherwise exist.

Contrary to respondent's contention (*e.g.*, Br. 19), the *Apprendi* rule does not reflect any constitutional preference for greater judicial discretion at sentencing; indeed, the common-law system that informs it "left judges with little sentencing discretion," because the law "'prescribed a particular sentence for each offense.'" *Alleyne*, 570 U.S. at 108 (plurality opinion) (citation omitted). Instead, *Apprendi*'s "animating principle is the preservation of the jury's historic role." *Ice*, 555 U.S. at 168 (citing *Apprendi*, 530 U.S. at 477). And in postjudgment proceedings involving revocation of

conditional liberty, the jury historically had *no* role. See U.S. Br. 31-35; accord Resp. Br. 27.

b. In any event, respondent errs in suggesting (*e.g.*, Br. 12) that reimprisonment under Section 3583(k) is an "enhancement" to reimprisonment under Section 3583(e)(3) that requires additional factfinding. Sections 3583(e)(3) and (k) are in fact parallel provisions of the same statute that provide alternative bases for reimprisonment.

Under either provision, a judicial finding by a preponderance of the evidence that a defendant violated the conditions of his supervised release is the prerequisite for revocation and reimprisonment. Revocation and reimprisonment under Section 3583(e)(3) is applicable to any defendant who is found to have violated any supervised-release condition, whether specific to that defendant (*e.g.*, a requirement to attend counseling) or universal to all defendants on supervised release (*e.g.*, the requirement not to commit a crime). Revocation and reimprisonment under Section 3583(k) is applicable to a specific type of defendant who is found to have violated a specific supervised-release condition.

A court considering the consequences of revocation is routed to one provision rather than the other based not on any *additional* factfinding, but instead on the *legal consequences* of the facts that it has found. The provisions could be seen to overlap, in that Section 3583(e)(3) would apply to any defendant who violates supervised release by committing any crime, see 18 U.S.C. 3583(d), while Section 3583(k) would apply to a specific type of defendant who violates supervised release by committing a specific type of crime. But the question of whether Section 3583(e)(3) or Section 3583(k) applies turns only

on the particular legal prohibitions that the defendant's conduct violated; it is a question of law, not of fact.

The provisions would function in precisely the same way if Congress had made their parallelism even more explicit—*e.g.*, by including a proviso spelling out that Section 3583(e)(3) applies only "except as otherwise provided in Section 3583(k)." But Congress was not required to include such nonoperative language simply to forestall an argument like respondent's. As a functional matter, Sections 3583(e)(3) and (k) work side-by-side, with no additional finding of fact required to trigger the latter.

C. Section 3583(k) Did Not Punish Respondent For A New Criminal Offense

Respondent appears to contend (Br. 12, 14-16) that this case calls for a novel application of *Apprendi*, or of due-process principles, on the theory that Section 3583(k) penalizes a new crime (the one underlying the violation) rather than the original one (for which the term of supervised release was imposed). That theory is unsound. Respondent's five-year term of reimprisonment —which followed proceedings initiated by the Probation Office (an arm of the court) upon finding a violation of the terms of his previously imposed sentence—was tied directly to his initial offense. Indeed, the link between his original conviction and his reimprisonment under Section 3583(k) was even tighter than it would have been under Section 3583(e)(3). Respondent's contrary theory relies on a strawman portrayal of Section 3583(k) in which courts order reimprisonment terms far longer than he received, than any other offender to our knowledge has ever received, or than the law would allow.

1. Respondent's reimprisonment under Section 3583(k) was tied to his original crime

The only authority respondent cites in laying out his theory is this Court's decision in *Johnson*—which *rejected* the argument that reimprisonment "imposes punishment for defendants' new offenses for violating the conditions of their supervised release." 529 U.S. at 699-700 (citation omitted). The Court noted that the argument had "some intuitive appeal," but explained that constitutional-avoidance principles required "[t]reating postrevocation sanctions as part of the penalty for the initial offense." *Id.* at 700.

Respondent would invert the constitutional-avoidance principle by interpreting Section 3583(k) to *invite* a constitutional problem. See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.") (citation omitted); see also *Jones* v. *United States*, 526 U.S. 227, 239-252 & n.6 (1999) (construing a federal statute to avoid *Apprendi* concerns). Indeed, his express goal is to invalidate most of that provision. Resp. Br. 30-35.

Nothing requires respondent's interpretation—least of all *Johnson*, which points directly the other way. See 529 U.S. at 701 ("We * * * attribute postrevocation penalties to the original conviction."). Respondent observes that *Johnson* considered only Section 3583(e)(3) and again tries to distinguish the later-enacted Section 3583(k). But he again identifies no relevant distinctions.

Respondent contends (Br. 15) that Section 3583(k) "severed the link between the original crime of conviction and the authorized term of reimprisonment" that

would exist under Section 3583(e)(3). To the contrary, however, the first sentence of Section 3583(k) makes clear that it applies to defendants who were originally convicted of certain specific crimes—primarily, sex crimes against children. See 18 U.S.C. 3583(k). And the second and third sentences of Section 3583(k) prescribe the reimprisonment term for such defendants who, while on supervised release and required to register as sex offenders, commit other listed offenses (again, primarily sex crimes against children). See *ibid.* The original conviction thus plays a central role in determining an offender's term of reimprisonment. A defendant originally convicted of a different type of crime—say, a drug crime—would not be subject to Section 3583(k) even if he violated supervised release by possessing the same images of child pornography that respondent did.

If anything, the link between the authorized term of reimprisonment and the original offense is even *tighter* under Section 3583(k) than under Section 3583(e)(3). Respondent does not dispute (*e.g.*, Br. 15) that under *Johnson*, reimprisonment under Section 3583(e)(3) for violating supervised release by, say, possessing drugs—which triggered mandatory revocation both at the time of *Johnson* and now, see 18 U.S.C. 3583(g); 18 U.S.C. 3583(g) (1994)—would be attributable to a conviction for a tax offense. By comparison, reimprisonment under Section 3583(k) for violating supervised release through illicit sexual activities involving minors is even more readily attributable to a conviction for illicit sexual activities involving minors.

Respondent also contends (Br. 14-15) that Section 3583(k) punishes a new crime, while Section 3583(e)(3) does not, because of the length of reimprisonment it requires. But nothing in *Johnson* suggests that the term of

reimprisonment authorized under Section 3583(e)(3) sets a ceiling (constitutional or otherwise) on what may be attributed to the original offense. And to the extent that such a ceiling may exist, respondent provides no reason to believe that a five-year term, like the one he received, exceeds it. Both at the time of *Johnson* and now, Section 3583(e)(3) *itself* has authorized a five-year term of reimprisonment for certain felons. See 18 U.S.C. 3583(e)(3) (1994). The Sentencing Commission likewise views terms of more than five years as sometimes appropriate, see Sentencing Guidelines § 7B1.4(a) (recommending reimprisonment for 63 months for certain defendants), even though its recommended reimprisonment terms are designed to "sanction primarily the defendant's breach of trust," *not* "new criminal conduct," *id.* Ch. 7, Pt. A, intro. 3(b).

Although a five-year term of reimprisonment is the maximum authorized under Section 3583(e)(3), Congress is entitled to view illicit sexual activity involving a minor, by someone on supervised release following a conviction for illicit sexual activity involving a minor, as an especially egregious breach of trust. It has long been the case that the length of a term of reimprisonment for violating parole, which is likewise attributable to the original offense, depends on "how many and how serious the violations were." *Morrissey*, 408 U.S. at 480; see Note, *Parole Revocation in the Federal System*, 56 Geo. L.J. 705, 731 (1968) (observing that a parole violator "may be * * * made to serve only part of the outstanding sentence"); see also *Morrissey*, 408 U.S. at 480 n.7 (citing that note). The Sentencing Commission's guidance similarly reflects that determining the appropriate term of reimprisonment for a breach of trust involves some consideration of the nature of the breach.

See Sentencing Guidelines Ch. 7, Pt. A, intro. 3(b), §§ 7B1.1, 7B1.4(a). Courts, in turn, obviously may recognize that failure to attend counseling sessions is a lesser breach of trust than running a sex-trafficking ring, and should not result in the same term of imprisonment. And Congress, no less than a parole board, the Commission, or a judge, may consider the nature of the violation—and, in particular, how it relates to the offense of conviction—in determining an appropriate term of reimprisonment.

2. Respondent's speculation about hypothetical excessive reimprisonment does not support facial invalidation of Section 3583(k)'s revocation provisions

Although the application of Section 3583(k) to respondent resulted in five years of reimprisonment, his argument relies in large part (*e.g.*, Br. 11) on Section 3583(k)'s authorization of longer terms that would not be available under Section 3583(e)(3). See 18 U.S.C. 3583(k) (term of "not less than 5 years"). Nothing in Section 3583(k), however, empowers courts to order reimprisonment terms that seek to punish a new criminal offense—indeed, courts are *precluded* from doing so. The sorts of excessive terms that respondent hypothesizes are thus nonexistent as a practical matter, impossible as a legal matter, and no reason to invalidate Section 3583(k)'s reimprisonment provisions in all of their applications.

a. In the analogous context of parole, this Court has recognized that even though "[i]n many cases, the parolee faces lengthy incarceration if his parole is revoked," *Morrissey*, 408 U.S. at 482, such reimprisonment is attributable to the original offense, and its imposition is not a new criminal prosecution, see *id.* at 480, 489. The Court has accordingly not applied the Sixth

Amendment, but instead relied on general due-process principles to balance a defendant's interest in continued conditional liberty against the government's "overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions" of that liberty. *Id.* at 483. And based on that balancing, the Court has held that due process for revocation and reimprisonment require an "informal hearing structured to assure that the finding of a parole violation will be based on verified facts"—but not any requirement that the finding be made by a jury beyond a reasonable doubt. *Id.* at 484, 489.

The effective substitution of five years of reimprisonment and five years of supervised release for the ten years of supervised release included in respondent's original sentence is precisely analogous to parole revocation. See *Morrissey*, 408 U.S. at 480. And the procedures applied at respondent's revocation hearing were undisputedly consistent with the "minimum requirements of due process" for such a revocation, *id.* at 489. Compare *ibid.*, with Fed. R. Crim. P. 32.1. Respondent accordingly does not contend that it would be an unconstitutional deprivation for a court to rely on judicial factfinding to order a five-year reimprisonment term under Section 3583(e)(3). It necessarily follows that it is not an unconstitutional deprivation for a court to rely on judicial factfinding to order an identical term under Section 3583(k).

If a defendant were actually subjected to a reimprisonment term of such length that it could not constitutionally be ordered without additional procedures, he would have standing to bring an as-applied due process

claim. But respondent, who received a five-year reimprisonment term, is not such a defendant. And if Section 3583(k) is not unconstitutional as applied to him, then it is not facially unconstitutional either. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

b. In any event, excessive terms of reimprisonment —such as the specter of life imprisonment that respondent frequently invokes (see Br. 11, 13, 15, 16, 18, 22, 23, 29, 32)—are not available even as a *statutory* matter under Section 3583(k). Instead, Congress has placed statutory constraints on a court's discretion to order reimprisonment for a violation of supervised release. Under those constraints, a court errs by treating reimprisonment as punishment for the supervised-release violation itself.

In any matter concerning the administration of supervised release, including revocation and reimprisonment, a court must "consider[] the factors set forth in [18 U.S.C.] 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)." 18 U.S.C. 3583(e); see 18 U.S.C. 3583(k) (authorizing reimprisonment "under subsection (e)(3)"). That directive requires consideration of most of the same factors that a court considers when it imposes sentence following a criminal conviction, see 18 U.S.C. 3553(a), but excludes the factor under which a court considers "the need * * * to provide just punishment for the offense," 18 U.S.C. 3553(a)(2)(A).

At the same time, the directive requires consideration of the Sentencing Commission's policy statements, see 18 U.S.C. 3553(a)(5), which take the approach that "at revocation the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying

violation and the criminal history of the violator," Sentencing Guidelines Ch. 7, Pt. A, intro. 3(b). The Commission's recommended ranges thus "seek to prescribe penalties *only* for the violation of the judicial order imposing supervision," and "do not purport to provide the appropriate sanction for [a] criminal charge" that "is a basis of the violation." *Id.* Ch. 7, Pt. B, intro. comment. Congress's omission of punishment for the new offense as a consideration in imposing reimprisonment, reinforced by the Guidelines and *Johnson*'s instruction to "attribute postrevocation penalties to the original conviction," 529 U.S. at 701, ensures that revocation sentences are reasonable and do not seek to punish the criminal conduct that may underlie a supervised-release violation.

Appellate review provides an additional safeguard against excessive reimprisonment. An offender who objects to the term of reimprisonment ordered by the district court may appeal, and the court of appeals will review it for procedural or substantive unreasonableness. See, *e.g.*, *United States* v. *Tyson*, 413 F.3d 824, 825 (8th Cir. 2005) (per curiam); see also, *e.g.*, *United States* v. *Mulero-Algarín*, 866 F.3d 8, 11 (1st Cir. 2017) (abuse-of-discretion review); *United States* v. *Vigil*, 696 F.3d 997, 1003 & n.3 (10th Cir. 2012) (review for "plain[] unreasonable[ness]") (citation omitted). Such review is deferential, and a district court's consideration of an excluded factor may not in itself always require reversal. See, *e.g.*, *United States* v. *Young*, 634 F.3d 233, 241 (3d Cir.), cert. denied, 565 U.S. 863 (2011); see also *United States* v. *Miqbel*, 444 F.3d 1173, 1183 & n.21 (9th Cir. 2006) (suggesting that reversal might be required). But courts of appeals can and should vacate inappropriate reim-

prisonment terms. See, *e.g.*, *Young*, 634 F.3d at 241 (explaining that reimprisonment term would be unreasonable if district court "place[d] undue weight on the seriousness of the violation"); see also, *e.g.*, *United States* v. *Simtob*, 485 F.3d 1058, 1063-1064 (9th Cir. 2007) (vacating for resentencing because the district court may have treated "the seriousness of [the defendant's] new criminal conduct as the primary consideration" for the reimprisonment term, which "would be unreasonable"). That includes unduly harsh terms that appear to sanction a new offense, rather than the breach of trust in violating supervised release on the original one, and thereby violate the basic premise of revocation, see *Johnson*, 529 U.S. at 700.

The courts of appeals have apparently not needed to vacate excessive reimprisonment terms of the kind respondent posits because the situation has not arisen. Respondent identifies no case in which a court has actually imposed life imprisonment—or anything close to it—under Section 3583(k). In the government's experience, nearly all terms of reimprisonment under Section 3583(k) are five years. Longer terms are quite rare, and to our knowledge, no court has ever ordered more than ten years of reimprisonment. The leeway provided by the statute allows courts to take account of especially problematic violations, such as engaging in sex-trafficking of a minor and production of child pornography under the Probation Office's nose. See D. Ct. Doc. 168, *United States* v. *Phillips*, No. 12-cr-161 (E.D. Mo. Mar. 8, 2018). It also allows defendants to stipulate to terms above five years as part of agreements that avoid new criminal charges that could result in even longer recidivist sentences. See D. Ct. Doc. 21, at 2, *United States* v. *Hammalian*, No. 15-cr-119 (D. Vt. July 5, 2018) (stipulated

six-year term); D. Ct. Doc. 52, at 1-2, *United States* v. *Masitis*, No. 06-cr-72 (D. Idaho June 9, 2016) (stipulated seven-year term).

II. AT A MINIMUM, SECTION 3583(k) CAN BE ENFORCED IF A JURY FINDS THE RELEVANT FACTS

After arguing at length (Br. 14-29) that Section 3583(k) violates the jury-trial right, respondent turns around and insists (Br. 30-35) that a jury trial would in fact be untenable. Respondent's resistance to an actual jury trial highlights the flaws in his merits position. At the same time, the difficulties he identifies are not so insurmountable as to justify the court of appeals' erroneous remedy of facial invalidation.

A. Respondent's identification of the practical problems with a jury trial in the supervised-release context reinforces why the Constitution does not in fact require one. In particular, it shines a spotlight on the central premise that respondent fails to refute: that revocation of supervised release under Section 3583(k)—like revocation of supervised release under Section 3583(e)(3), revocation of parole, or revocation of probation—"arises after the end of the criminal prosecution." *Morrissey*, 408 U.S. at 480.

Notwithstanding his position that the Constitution requires a jury trial, respondent explains (Br. 31) that "engrafting jury trial requirements" onto revocation proceedings would be unprecedented, inappropriate, and infeasible. He devotes particular attention (Br. 34) to the practical problem that "there is no jury ready and waiting to make factual determinations at a revocation hearing," unlike in previous *Apprendi* cases where juries were "already empaneled" to make factual "determinations that trigger an enhanced sentence."

The government made similar observations in its opening brief (Br. 36-39). The government also pointed out (Br. 29-30) that the facts relevant to supervised-release revocation do not exist until after trial and judgment (and imprisonment) and thus cannot be "alleged in the indictment" as an "element[]" of the offense, which this Court has repeatedly described as central to the right to a jury trial in a criminal prosecution. *Apprendi*, 530 U.S. at 480; see, *e.g.*, *Alleyne*, 570 U.S. at 109-111 (plurality opinion). Requiring a new jury to be convened to find the facts underlying a supervised-release violation would create "bifurcated or trifurcated" trials that this Court has said "make scant sense" and that *Apprendi* does not require. *Ice*, 555 U.S. at 171-172. Respondent's own recognition of those problems is the thirteenth chime of the clock on his constitutional claim.

B. Although practically difficult, it would not be impossible to convene a jury in a supervised-release proceeding at which Section 3583(k) applies. And allowing for that option is a less extreme, and more appropriate, remedy than outright invalidation, if this Court concludes that the jury-trial right in fact applies to such a proceeding.

As the government has explained (Br. 52-53) and respondent nowhere refutes, requiring jury findings beyond a reasonable doubt is not incompatible with any statutory requirement. The statute incorporates the Federal Rules of Criminal Procedure, which could be amended to provide for convening a jury when necessary. See 18 U.S.C. 3583(e)(3) and (k); Fed. R. Crim. P. 32.1. Respondent contends (Br. 32) that allowing courts to enforce Section 3583(k) following jury findings is unnecessary to vindicate "Congress's intent in enacting

§ 3583(k)." His arguments, however, disregard that intent. He asserts (*ibid.*) that "Congress has already" accomplished its "intent in enacting § 3583(k)" through *other* statutes. But Congress evidently disagreed with that judgment, or else it would not have enacted Section 3583(k). Respondent similarly asserts (Br. 33) that invalidating the challenged provisions "would not frustrate or interfere with Congress' basic purpose" because the remainder of the statute would be "substantially the system of supervised release that existed" *before* "Congress added the portions of § 3583(k) at issue in this case." But invalidating a statute always restores the statutory scheme that existed before "Congress added" the challenged law, *ibid.* Respondent's focus on Congress's intent in statutory provisions other than the one "at issue in this case," *ibid.*, cannot be squared with this Court's directive to determine "the Legislature's intent *as embodied in the*" the statute at issue, *Booker*, 543 U.S. at 246 (emphasis added).

Remedying the denial of the jury-trial right by providing a jury trial reflects the commonsensical approach that this Court has taken in most of its *Apprendi* decisions. See U.S. Br. 52. In urging a different approach, respondent cites (Br. 33) *Booker*, *supra*, which declared the Sentencing Guidelines advisory rather than requiring their enforcement as mandatory with a jury-trial requirement. 543 U.S. at 245-246. But *Booker* adopted that distinctive remedy only after determining that, among other things, requiring a jury would undermine "Congress' basic statutory goal" to "diminish[] sentencing disparity," which "depend[ed] for its success upon *judicial* efforts to determine, and to base punishment upon, the real conduct that underlies the crime of conviction," *id.* at 250 (emphasis added and omitted);

see *id.* at 251-254. Jury findings in revocation proceedings, while difficult, would not "destroy the system" that Congress designed, *id.* at 252—if the Constitution in fact required such findings.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

FEBRUARY 2019

No. 17-1672

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANDRE RALPH HAYMOND,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* DUE PROCESS INSTITUTE IN SUPPORT OF RESPONDENT

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Statement of Interest[1]

The Due Process Institute is a non-profit, bipartisan, public-interest organization that works nationwide to honor, preserve, and restore principles of fairness in the criminal legal system. Formed in 2018, the Institute has already participated as *amicus curiae* before this Court in a number of cases raising important constitutional issues, such as *Timbs v. Indiana*, No. 17-1091 (*certiorari* granted June 18, 2018) and *Turner v. United States*, No. 18-106 (petition for *certiorari* pending). Our concern about the law before the Court echoes Justice Black's later-vindicated dissent in *Green v. United States*, 356 U.S. 165 (1958): "[E]xtraordinary authority [may] first slip[] into the law as a very limited and insignificant thing," but unless promptly checked, it may become a "pervasive mode of administering criminal justice, usurping our regular constitutional methods of trying those charged with offenses against society." *Id.* at 194.

Introduction and Summary of Argument

"This case involves basic questions of the highest importance far transcending its particular facts." *Green*, 356 U.S. at 194 (Black, J., dissenting). The regime the United States asks this Court to approve is without precedent and contrary to our Nation's legal tradition. 18 U.S.C. § 3583(k) establishes a proceeding where a person may be sentenced to life in prison without parole, based on a single judge's finding that he "commit[ted] an[] offense" codified in

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and counsel made a monetary contribution to its preparation or submission. The Petitioner has consented to the filing of this brief and the Respondent has filed a blanket waiver.

Title 18 of the U.S. Code. Even a close finding of culpability by a preponderance of the evidence suffices, though that standard has been held constitutionally *inadequate* to impose eighteen months' juvenile detention, *In re Winship*, 397 U.S. 358 (1970), or a contempt fine, *Int'l Union, UMW v. Bagwell*, 512 U.S. 821 (1994).

The sentence authorized is far longer than the maximum Congress authorized for respondent's 2010 conviction under 18 U.S.C. § 2252; it is far more severe than the maximum Congress authorized for a *recidivist* conviction. (Indeed, the Government's appears to take the position that a defendant sentenced to life in a subsection (k) proceeding could be prosecuted and punished additionally under section 2252, Br. 51). And the subsection (k) penalty is different in kind from the revocation sentences provided for any other supervised release violation, including the most serious. Had respondent committed *homicide* while on supervised release under the 2010 conviction, the maximum revocation sentence would have been two years. And even then, the district court would be under no mandate to order revocation or any prison term. Rather, as with every other violation of a supervised release condition, the sentencing decision would be made in light of what the Government agrees is the "predominant goal" of supervised release, "to ease the defendant's transition into the community," S. Rep. 98–225, at 125 (1984), disregarding punishment; and in accord with the "parsimony principle" Congress codified in 18 U.S.C. § 3553(a).

The Government seeks to obscure these stark realities beneath a welter of labels, insisting countless times that subsection (k) entails merely

"administering a sentence," rather than imposing one; that the defendant is not being "prosecuted" within the meaning of the Sixth Amendment; that a court is merely "revoking" the defendant's "conditional liberty," not convicting and punishing him for the offense it has determined he committed.

I. None of that is tenable. As the Court has long taught, when the substance of the Fifth and Sixth Amendments collides with a label, the latter must yield. "The fundamental meaning of the jury-trial guarantee of the Sixth Amendment[—]that all facts essential to imposition of the level of punishment that the defendant receives" must be found beyond reasonable doubt—does not vary, "whether the statute calls them elements of the offense, sentencing factors, or Mary Jane"—or "post-judgment sentencing facts." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

No one looking at the text and structure of subsection (k)—and no one wandering into Judge Kern's courtroom in 2016—would have any doubt that he was adjudicating and imposing punishment for a crime, an "infraction[] of the law, visited with punishment as such." *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.); *id.* ("If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech"). By the same token, no observer would describe what was transpiring as "sentence administration." A judge assigned to preside over a subsection (k) proceeding needs to know next to nothing about the sentence she ostensibly is "administering." The gravity of the conviction offense would be irrelevant, *compare* 18 U.S.C. § 3583(e)(3), as would the length of the

sentence of imprisonment and term of supervised release imposed when the defendant was convicted, or the maximum prison term that *could have been* imposed. Indeed, Judge Kern, in imposing the mandatory five-year sentence here, pronounced it "repugnant" that subsection (k) required respondent's long imprisonment without a jury and proof beyond reasonable doubt. Resp. Br. 2.

In our legal system, imprisonment is presumptively punishment, and when a law provides *longer* incarceration than could be imposed under the criminal code for the same conduct—and the sentence is life and the conduct is "commit[ting] an[] offense"—the inference is irrefutable. It is fanciful to suggest that subsection (k) rests on a congressional judgment about "breaches of trust," but if that were true, defendants would still be entitled to a jury trial and the protection of the beyond-reasonable-doubt proof standard. *See Int'l Union, UMW v. Bagwell*, 512 U.S. 821 (1994).

The Government's claims that it has combed the historical record for a comparable jury trial right betrays a certain obtuseness. Although the subsection (k) regime is facially incompatible with the binding interpretation of the Sixth Amendment established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it does not take an *Apprendi* enthusiast to recognize that a proceeding where a defendant stands to be punished based on a determination of factual guilt or innocence is within "the jury's traditional domain." Br. 31 (quoting *Oregon v. Ice*, 555 U.S. 160, 168 (2009)). Rather, the burden is on the Government to identify what, *apart from* a label—*i.e.*, the fact that subsection (k) appears in the supervised release provision of Title 18—distinguishes this proceeding from countless

others where a defendant's imprisonment requires a determination he "commit[ted] an offense under [a] chapter [of Title 18]."

That respondent has "previously been found 'guilty of a crime against the people,'" U.S. Br. 37 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)) does not suffice. The Government cannot contend that, in a prosecution under a repeat offender statute, the fact of the defendant's guilt on the *second* offense may be determined without a jury. *Cf. Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Nor can it be that only persons with "absolute liberty" are fully protected by the Fifth and Sixth Amendments, *see* U.S. Br. 38; there is a long history of affording the full panoply of rights to defendants accused of committing crimes *in prison*, though they occupy a far lower place on the "continuum" of liberty than do persons on post-release supervision.

And, as this Court's decisions concerning punishment for contempt establish, it makes no constitutional difference that the prohibition a defendant is accused of violating appears in a criminal statute, in a judicial decree, or (as here) in both. *See Bloom v. Illinois.*, 391 U.S. 194 (1968). Indeed, to the extent that there is no long history of juries determining alleged transgressions of "do not violate the criminal law" orders, it is because courts long refrained from issuing them, out of deference to the "regular constitutional methods of trying those charged with offenses against society." *Green*, 356 U.S. 194 (Black, J., dissenting). But as that reticence has receded, it has been settled that a defendant accused of violating such an order is entitled to have her guilt beyond a reasonable doubt be determined by

a jury. *See United States v. Dixon*, 509 U.S. 688, 695 (1993).

II. The Government's defense ultimately rests on a different label: "revocation." If subsection (k) only provided that a person (or even someone on supervised release) committing an enumerated offense would be sentenced up to life in prison, the Government presumably would concede, its codification in Section 3583 would not suffice to extinguish defendants' Fifth and Sixth Amendment rights. Rather, the Government argues that because it *also* provides for —automatic—"revocation" upon a determination of guilt and because it references Section 3583(e) (principally to say that section's limitations *do not* apply), a wholly different constitutional analysis should govern, one that permitted parole and probation revocations without juries in *Morrisey* and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)—and that led the Court in *Johnson v. United States*, 529 U.S. 694 (2000), to "appear[] to" see supervised release revocations under subsection (e)(3) as "unproblematic." U.S. Br. 21.

That is wrong. In appearance, the modes of post-release supervision may not have much changed between the federal parole era and the present; nor has the *conduct* of revocation hearings. But, as a matter of constitutional substance, the world is fundamentally different. The features that made parole revocation hearings constitutional—that defendants *could not* be ordered to serve more time in prison than their sentence at trial imposed and enjoyed "conditional liberty" that an *early* but provisional release afforded—were swept away when Congress decided in 1984 that time previously spent on parole (two-thirds of a defendant's sentence) would

have to be served in prison. And release at the end of sentence no longer depends on the defendant's "promise" to comply. Br. 38. Release at the end of a full sentence is a matter of entitlement, and the post-release conditions are binding, with or without the defendant's agreement. Those conditions include measures needed for effective supervision, including searches that would be "unreasonable" under the Fourth Amendment for others, but they don't establish a degraded citizenship status generally and don't extinguish defendants' Fifth and Sixth Amendment rights.

The Sentencing Reform Act also established a brief and discretionary supervised release regime, as a nonpunitive adjunct to supply the supportive rehabilitative interventions that parole previously provided and that some persons would still need on first leaving prison. Congress subsequently added provisions explicitly authorizing sanctions—including imprisonment for "brief periods"—in order not to punish but to promote compliance and make the supervision system operate more effectively.

That is the understanding of the law that the Court adopted, at the Government's urging, in *Johnson*. That case did not raise a Fifth or Sixth Amendment challenge to a prison sentence of any kind, let alone to one like subsection (k), which was not enacted until years later. But to the extent the Court saw the regime before it as untroubling, subsection (k) wipes away all the features that made it so. Under the version of Section 3583 in effect in *Johnson*, and still operative today for almost every alleged supervised release violation, neither revocation nor imprisonment was mandatory; and periods of incarceration were subject to relatively

brief "caps," which were and are determined by the seriousness, not of the (alleged) violation, but rather the offense of conviction. Indeed, under the version of the law in effect when Johnson's supervised release was revoked, those caps applied to aggregates: The most time respondent here could have spent in prison if he repeatedly and seriously violated conditions was two years in total. Those provisions were designed to prevent—and do in fact prevent—what the Government asks the Court to countenance here, a "usurp[ation] of our regular constitutional methods of trying those charged with offenses against society," whereby prosecutors, at their discretion, may obtain severe criminal punishment under a much less rigorous proof standard, based on the views of a "single employee of the [Government]," *Apprendi*, 530 U.S. at 498 (Scalia, J. concurring).

III. The court of appeals here was correct—and the Government is wrong—as to the appropriate remedy. To the extent subsection (k) authorizes an alternative procedure for finding a defendant guilty of committing a federal offense and sending him to prison, it is constitutionally impermissible, full stop. That regime is inconsistent with the jury trial guarantee and the beyond-reasonable-doubt requirement—and numerous other safeguards that traditionally operate when a person is accused of an offense that carries such serious punishment.

It makes no sense, as a matter of constitutional law, congressional intent, or judicial administration, for this Court to invent a different, hybrid procedure for these cases, especially one that grafts some constitutional protections, but not others, onto a procedure designed and suited for making discrete, highly discretionary, and non-punitive adjustments

to a defendant's post-release status. The Tenth Circuit's straightforward resolution imposes no special hardship: It allows the Government to address allegations of repeat Section 2252 violations by persons on supervised release in the same way it treats fresh homicide allegations (indeed, the same way it treats persons whose initial Section 2252 convictions pre-date the 2006 amendments to subsection (k)). A defendant would be subject to criminal trial for that offense *and* subject to revocation and potential further incarceration, based on a preponderance finding that his conduct violated the "do not offend" condition that appeared in the supervised release part of his initial sentence.

ARGUMENT

I. The Determination Subsection (k) Calls For Is One The Constitution Requires Be Made By A Jury, Based On Proof Beyond A Reasonable Doubt

The repugnance Judge Kern expressed on imposing sentence in accordance with subsection (k) was warranted—and consistent with his oath of office. Subsection (k) works a plain and serious violation of the Constitution. As respondent carefully demonstrates, the provision fails the *Apprendi* test in stark fashion: subsection (k) requires defendants to be sentenced to prison for at least five years—in addition to the term that their conviction justified—based on a "particular fact," not found by the jury that rendered a guilty verdict or any other, a fact that this law "makes essential to [the] punishment" imposed. *United States. v. Booker*, 543 U.S. 220, 232 (2005) (quoting 542 U.S. at 301).

The Government does not seriously argue otherwise, and its desultory efforts cannot succeed. The Government posits that this prison term *is* "authorized" by the original verdict, Br. 46—in the sense that a conviction for Section 2252 automatically triggers a term of supervised release, which in turn requires the imposition of conditions and the subsection (k) sentence in the event of a judicially-determined violation of an enumerated offense. But that sort of argument is what *Apprendi* forecloses: The defendant was on notice that a jury's verdict would result in twenty-year sentence *if* the judge found a further aggravating fact by a preponderance of the evidence, just as someone sentenced to the ten-year maximum for Section 2252 would be on notice that he would spend at least fifteen years' imprisonment if a judge found the "particular fact" called for in subsection (k). The fatal Sixth Amendment defect *Apprendi* identified applies fully here: The judge could not, based on the jury findings *alone*, impose the longer sentence. The "'statutory maximum' for *Apprendi* purposes ... *[i]s not* the maximum sentence a judge may impose *after* finding additional facts." *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004) (emphasis added). *Accord Ring v. Arizona*, 536 U.S. 584, 602 (2002) ("[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt").

The Government's principal argument is not that subsection (k) *satisfies* the Sixth Amendment test *Apprendi* and its progeny establish, but rather that it is exempt from it. The *Apprendi* line, the Government insists, does not require jury determination of "post-judgment sentencing facts," Br. 30—only facts that

could be alleged in an indictment. That is a doubtful description of the *Apprendi* doctrine, and it is a wholly untenable account of the Sixth Amendment. Neither *Apprendi* nor its progeny is fairly read as announcing or enforcing the limit the Government describes. Those opinions said "any" and "all" facts, and all but one *granted* relief to defendants, on the ground that the legislature's designation of an aggravating fact as a "sentencing factor," rather than an element of the offense, could not trump the accused's constitutional right to have punishment limited to the maximum the jury verdict alone allowed. And the lone decision rejecting an *Apprendi* claim, *Oregon v. Ice*, 555 U.S. 160 (2009), hardly supports the Government here. The defendant in that case received two separate sentences, each supported by a jury determination of guilt, and the Court held that the Sixth Amendment did not require jury involvement in deciding whether they should be served consecutively; respondent here received sentences based on one jury verdict and one judicial finding.

The Sixth Amendment problem here is much more basic than what has confronted (and often divided) the Court in *Apprendi* and progeny. The "fact" on which subsection (k) defendants are denied jury determination—and that subjects them to a five-year-to life prison sentence is one that has *never*, under any sentencing regime, been considered a "sentencing factor" or otherwise committed to judge, rather than jury, resolution: whether or not he is guilty of "commit[ting] an offense" established under a chapter of the federal criminal code.

The precedent for having a jury determine *that* question is not scant or hard to find; it is *ubiquitous*—it is what happens—indeed, what the Constitution

demands—in every criminal prosecution under Section 2252 and for every other non-petty offense. That the facts alleged to state an offense under chapter 110 in this and other subsection (k) proceedings are "post-judgment," Br. 20, and thus entirely distinct from ones on which the jury rendered an earlier guilty verdict is not argument *against* jury determination. This Court has considered what the Sixth Amendment requires in cases, like those under subsection (k), where the punishment a defendant faces is based on the fact that he has "already 'been convicted of a crime,'" U.S. Br. 18 (quoting *Gagnon*). In *Almendarez-Torres v. United States*, 523 U.S. 224 (1988), the Court reaffirmed that it is constitutional and appropriate to treat repeat offenses as distinct, aggravated crimes, and further held, over forceful dissent, that when a defendant is accused of being a repeat offender, *that* fact need not be proven to a jury. And so it is where a person previously convicted of Section 2252 is accused for a second time of committing that offense. But nowhere there, or anywhere else, has it been suggested that in such cases, the determinations of *factual guilt* for both offenses requires anything but jury determination, under the beyond-a-reasonable-doubt standard. (Indeed, there is no question that the many other safeguards—including thee rights to a trial in the State and district where the offense occurred, to confront witnesses, and to compulsory process—are also guaranteed). *Compare* Pet. App. 31a-32a (Kelly, J., dissenting) (arguing that it was sufficient that respondent "was tried and found guilty beyond a reasonable doubt of the original offense" and received "the full panoply of rights during his initial criminal proceeding").

Thus, it cannot be denied that a prior conviction for a similar offense does not in itself effect a life-long forfeiture of the Constitution's safeguards against an unfair trial or an unjust conviction arising from "post-judgment" facts. Nor does a conviction effect even a temporary forfeiture. The Government surely does not dispute that if a person just beginning to serve a sentence is accused of committing a similar offense *in prison* is entitled to the "full panoply" of trial protections, *see, e.g.*, *Schlup v. Delo*, 513 U.S. 298, 304 (1995), even though he occupies an unfavorable place on the "'continuum' of state-imposed punishments." *Samson v. California*, 547 U.S. 843, 850 (2006).

Indeed, it is doubtful that the Constitution would allow a defendant to *voluntarily* surrender Fifth and Sixth Amendment rights in future proceedings, in exchange for the valuable benefit of leniency on a pending charge. *Cf. Speiser v. Randall*, 357 U.S. 513 (1958). But subsection (k) does worse than that: It imposes that forfeiture, in many cases for life, on defendants who have no choice in the matter and who have received and served the full punishment for their conviction—including, in some cases, the maximum Congress permitted to be imposed on anyone convicted of the offense. It is incumbent on the Government to articulate a "distinction of constitutional significance," *United States v. Booker*, 543 U.S. 220, 233 (2005), between accused second offenders (1) who either are wholly free *or* still in prison, and (2) those who are on supervised release.

The fact that the latter group are, by virtue of the supervised release "part of the[ir] sentence," under court order to not violate Section 2252 does not supply a constitutionally sufficient distinction. On its own terms, the premise that subsection (k) imposes

punishment for a "breach of trust," and not for committing the offense, warrants maximal skepticism. The penalty authorized is a mandatory prison sentence with a longer maximum than the recidivist Section 2252 criminal offense carries. While no one expects Congress to make "every possible supervised-release violation result in reimprisonment for the *exact* same length of time," U.S. Br. 49 (emphasis added), it is hard to credit that a legislature willing to authorize this punishment would categorically *forbid* district courts from more than two-year sentences for disobeying conditions the court itself imposed or for breaking the "promise" to not commit homicide. Br. 38.

The Government points to no evidence that Congress actually made the "categorical determination" Judge Kelly hypothesized. The condition alleged to have been violated did not derive from the court whose "trust" respondent was alleged to breach, but rather through operation of three statutes Congress enacted, *see* 3583(a) (requiring that persons convicted of sexual offenses serve supervised release); *id.* § 3583(d) (requiring that district courts prohibit); *id.* § 2252 (prohibiting knowing possession of pornographic depictions of minors), and the district court made clear that the breach did not warrant more than two years' imprisonment, Resp. Br. 8, and that it would have acquitted had the criminal proof standard governed. Pet. App. 68a.

But if disobedience *were* the actual basis for imposing punishment, that would not make the regime constitutional. This Court's decision a half century ago in *Bloom v. Illinois*, settled that the Constitution *does* require jury trials and proof beyond a reasonable doubt in cases where disobedience of a

court's order is the basis for imposing punishment. That decision disavowed contrary statements in more than a century of opinions in favor of the logic articulated in Justice Holmes's *Gompers* opinion and Justice Black's *Green* dissent: that judicial "decrees are simply another form of sovereign directive aimed at guiding the citizen's activity" and do not occupy "any higher or different plane than the laws of Congress ... insofar as punishment for their violation is concerned." 356 U.S. at 219.

These cases refute the Government's claims that "post-judgment" jury fact-finding is unheard of or historically anomalous. Indeed, supervised release orders are essentially injunctions, which impose affirmative and prohibitory obligations, not least to refrain from violating criminal laws. Notably, that sort of directive, which now appears in almost every federal criminal judgment—is of recent origin. For centuries, equity courts refused to enjoin crimes, because doing so would necessarily impinge on the regular constitutional means for enforcing criminal laws. *See United States v. Dixon*, 509 U.S. 688 (1993). But in modern practice, alleged violations of those orders are held trigger the same full protections. *See id.* at 695; *see also Bagwell*, 512 U.S. at 843 (Scalia, J., concurring) ("As the scope of injunctions has expanded, they have lost some of the distinctive features that made enforcement through civil process acceptable.").

In fact, even before this Court reversed course in *Bloom*, Congress by statute provided (for cases where the United States is not a party) that persons accused of a contempt that "also constitutes a criminal offense under any Act of Congress, or under the laws of any state [are] ... entitled to trial by a jury, which shall

conform as near as may be to the practice in other criminal cases." 18 U.S.C. § 3691, and further that imprisonment in such cases may not "exceed the term of six months." *id.* § 402. *Cf. Muniz v. Hoffman*, 422 U.S. 454, 475 (1975) (jury trial not constitutionally required for criminal contempt if punishment is less than six months). This 70-year-old federal regime adopts exactly the distinction the Government here brushes aside as making "little sense." Br. 48-49.

Indeed, a further reason for recognizing jury trial rights in contempt cases has special resonance in the subsection (k) setting. As the Court emphasized in *Blakeley*, the Sixth Amendment right is a "fundamental reservation of power in our constitutional structure," and meant to "control the judiciary." 542 U.S. at 305-06. *Accord Apprendi*, 530 U.S. at 547-48 (O'Connor, J., dissenting) (the jury trial guarantee functions "to protect the criminal defendant against potentially arbitrary judges"). In cases like this one, as with contempt, it is a constitutional serious concern, not a virtue, that the person initiating the proceeding—and authorized to determine guilt and punishment—is often the same one whose trust defendant allegedly breached and who previously earlier adjudged the defendant guilty. *Cf.* U.S. Br. 31 (suggesting that the fact revocation "is ordinarily initiated by a judicial officer or the court itself, not by a prosecutor" is reason for withholding jury trial). Because judges "remain human even after assuming their judicial duties," and are not immune to "pettiness and bruised feelings," subsection (k) defendants need the "historic ... bulwark" juries provide at least as much as others do. U.S. Br. 19 (quoting *Ice*, 555 U.S. at 168).

The record in this case raises no immediate concern on that score. The district court appears to have been fair and admirably forthright in its dealings with respondent (though it did commit clear error in its factual finding against him). But the power subsection (k) vests in a single individual—to impose not six months' imprisonment or two years', but rather life without parole, based on his own view of the facts, is wholly extraordinary.[2]

The "historical[] anomal[y]" in this case, U.S. Br. 20, is that a federal statute authorizes life imprisonment without parole based on a judge's belief that a defendant, more likely than not, committed a crime. Subsection (k) replicates the hypothetical regime that all—"even *Apprendi's* critics"—"would reject" as a constitutionally intolerable, "absurd [Sixth Amendment] result," *Blakely*, 542 U.S. at 306: It authorizes the second-most-serious punishment known to the law based on a verdict of guilt for an unrelated Class C felony and a judicial fact-finding. And it implicates the core purposes of the jury-trial

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[2]This is not to suggest that the precise regime governing contempt trials should—or must—be transplanted to supervised release revocation hearings or that defendants are entitled to juries in every proceeding where incarceration is theoretically possible. Many revocation sentences are brief and aimed at securing compliance with conditions, and would thus not trigger jury trial rights if the contempt analogy governed. *See Bagwell*, 512 U.S. at 829. And in many cases where a violation of the "do not re-offend" command is the basis for seeking revocation, the defendant has already been criminally convicted, in which case the *Almendarez-Torres* rule would foreclose any jury plea. *See, e.g., Johnson*, 529 U.S. 697. And it surely is constitutionally significant that the avowed object of the regime in which such proceedings occur, unlike that of civil trials, is to *benefit* the defendant—and that judges' powers are constrained by statute in ways that have no analogue in contempt law.

guarantee and the core competence of the Anglo-American criminal jury:

> [F]rom its numbers, the mode of their selection, and the fact that jurors come from all classes of society, [the jury is] better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be.

People v. Garbutt, 17 Mich. 9, 27 (1868) (Cooley, J.)).

There can be no suggestion here, very much unlike with other claims considered in the Court's recent decisions, that the Sixth Amendment's purposes—or defendants' interests—point in both directions. *See, e.g., Oregon v. Ice*, 555 U.S. 160, 171 (2009) (requiring jury involvement in structured process for making concurrent sentencing decision could reward reversion to wholly discretionary judicial decisionmaking); *Apprendi*, 530 U.S. at 546 (O'Connor, J., dissenting) (objecting that Court's rule affords preferential Sixth Amendment treatment to entirely discretionary judicial sentencing). And there is no countervailing governmental interest comparable to the historic "broad power to define crimes and their punishments," *id.* at 524—only boiler-plate assertions of practical difficulty. But "restrictions upon authority for securing personal liberty, as well as fairness in trial to deprive one of it, are always inconvenient—to the authority so restricted." *In re Oliver*, 333 U.S. 257, 280-81 (1948) (Rutledge, J., concurring).

II. The Revocation Label Does Not Place The Subsection (k) Regime Beyond The Reach Of The Fifth and Sixth Amendments

The Government has identified no constitutionally significant basis for affording drastically different procedures for adjudicating guilt and imposing punishment within the group of defendants who, having previously been convicted of a sexual offense, are accused of committing another.

When the Government nonetheless announces that "history, tradition, constitutional text" all prove the constitutionality of Section 3583(k), its claim is limited to a label-based argument: (1) that *Morrissey* and *Gagnon* held that parole and probation may be revoked based on a judicial determination of a violation; (2) that supervised release revocation is close enough to parole revocation; and (3) that subsection (k) proceedings, in turn, are similar enough to ordinary revocation hearings to keep the Fifth and Sixth Amendments at bay. Indeed, the often-exotic verbal formulations in the Government's brief appear to have been reverse-engineered to reinforce this syllogism: Prison sentences are "deprivations of conditional liberty"; findings of guilt and innocence are "sentence implementation facts"; etc.

But the Government's second and third premises are both wrong. Although the present-day supervised release regime is, in appearance and daily operation, a continuation of earlier mechanisms—imposing restrictions, requirements, and supports to enable successful reintegration—it also operates in a larger framework that is, in almost every way, a deliberate repudiation of its predecessor. Those fundamental differences make supervised release *revocation*

diverge in important and constitutionally significant respects from parole revocation. The features that made the regimes in *Morrissey* and *Gagnon* essentially immune from Fifth and Sixth Amendment invalidation and maintained a sharp division between "sentencing implementation" and criminal law enforcement no longer operate. Instead, the Sentencing Reform Act relies on a suite of statutory provisions that together ensure that revocation and incarceration remain mechanisms ancillary to integrating persons leaving prison and not a means of "usurp[ing] our regular constitutional methods of trying those charged with offenses against society." Those features played a central role in the Government's defense of the supervised release regime in *Johnson*. It is precisely those safeguards that subsection (k) jettisons.

First, while parole was the "precursor" of supervised release as a monitoring regime, U.S. Br. 21, it is error to say that Congress replaced parole with supervised release. Rather, the Sentencing Reform Act replaced parole with *incarceration*. In the pre-1984 era, federal sentencing was indeterminate; courts, "as a general rule, [could] conditionally release a prisoner any time after he serve[d] one-third of the judicially fixed term," *United States v. Grayson*, 438 U.S. 41, 47 (1978); and many defendants in fact served no more than that. *See Barber v. Thomas*, 560 U.S. 474, 482 (2010). The Sentencing Reform Act brought an end to that, "mak[ing] all sentences basically determinate," in the interest of "uniformity and greater honesty.": "The sentence the judge imposes [became] the sentence the offender actually serve[s]." *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 367 (1989)). The supervised release regime was in fact a late addition, a recognition that though

Congress meant a decisive break from the individualized, rehabilitative focus of the prior regime, there would still be defendants leaving prison after serving full-term sentences who might benefit from the kind of support and monitoring formerly extended through the parole process. *See generally* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958 (2013).

In contrast, the "essence" of the former parole system was "release from prison, *before the completion of sentence*, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrissey*, 408 U.S. at 477 (emphasis added); *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 365 (1998) ("In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements."). And that *early* release could be recalled or revoked, and the "prisoner," retaken, in the event of noncompliance, at which point the remainder of the sentence would be reinstated, subject to future parole opportunities. Under that system, what happened in respondent's case—a defendant's being subject to five years' imprisonment *beyond* the term he received on conviction—was inconceivable, indeed logically impossible, let alone serving more time in prison than the statutory maximum for a conviction offense, let alone life without parole.

In a real sense, no Sixth Amendment problem was possible under this system. Upon revocation, a defendant served the unserved portion of his sentence in prison (or out, if subsequently paroled), and he was released. The defendant's overall period of

involvement might exceed the length of his sentence, and the time spent in prison, greater than if he had never violated the terms of parole, but no defendant served more prison time than the verdict of conviction allowed.[3]

Probation was (and is) essentially identical, particularly in cases where the sentence was imposed upon conviction, but its execution is suspended. Probation was generally thought even more advantageous to the defendant than parole, because he might never set foot in prison (rather than serving one-third of a sentence). But like parole revocation, and unlike revocations in the present-day "determinate" regime, the outer limit of a revocation proceeding was reinstatement of the sentence imposed at the time of conviction—with the possibility of parole (and no further supervision once that sentence was served).[4]

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[3] To be sure, defendants whose parole was revoked near the end of their term *were* not entitled to credit for the time they were "on the street," subject to reporting obligations and with less than complete freedom. But defendants whose supervised release is revoked lose that, too, in addition to extra time they serve in prison (and under post-release oversight). It has in any event been this Court's teaching that imprisonment is a uniquely serious form of punishment and that the exchange rate with noncustodial supervision regimes is very steep. *See Granderson v. United States*, 511 U.S 39 (1994); *Frank v. United States*, 395 U.S. 147 (1969).

[4] Ordering probation by suspending *imposition* of sentence was somewhat less defendant-friendly; the defendant still emerged from sentencing with the prospect of never going to prison, but any sentence he did receive would be imposed at a juncture when the court had found a violation warranting revocation. That, presumably, is why the Court in *Mempa v. Rhay*, 389 U.S. 128 (1967), treated such proceedings differently than the ones in *Gagnon*, notwithstanding the "post-judgment"

There were many serious objections to that sentencing regime, including to the administration of revocation hearings.[5] But revocation proceedings of the kind before the Court in *Morrissey* and *Gagnon* were *per se* compliant with *Apprendi*. Moreover, without minimizing the individual hardship of being returned to prison, it is not hard to see how many courts saw parole revocation as more a breach-of-contract remedy rather than a punishment. Defendants had an option to reject the restrictions early release entailed, by not seeking parole; the time remaining on the original sentence, and not the new violation defined the revocation "sentence"; and, consistently with the regime's rehabilitative focus, reimprisonment was itself temporary, given future parole opportunities. When this Court and others described parole revocation as a deprivation of "conditional liberty," *Morrissey*, 408 U.S. at 483, they were not speaking in a loose or metaphorical way: A defendant achieved absolute liberty once he had completed serving his full sentence; "conditional liberty" referred to the time spent outside prison, by virtue of a paroling authorities' decision to release him early.

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posture. But those defendants could not be required to serve more than the sentence imposed, which could not exceed the maximum authorized.

[5] Among the complaints leveled at this regime were that initial sentencing inscrutable, unpredictable, and nonuniform; that parole authorities exercised releasing discretion arbitrarily and discriminatorily and likewise treated those under supervision unequally. *See, e.g.*, M. Frankel, Criminal Sentences: Law Without Order (1973).

Persons subject to supervised release under present law are not given the benefit of early release. Release is nondiscretionary; the defendant must have served the entire prison sentence his conviction was determined to warrant (minus good time credit), at which point 18 U.S.C. § 3624(a) mandates he be released (or on the proceeding Friday, if the term ends on a weekend). Persons on supervised release are not, as the Government implies, "allow[ed]," U.S. Br. 5, to serve "part of," *id.*, their prison terms at liberty, "on a promise" to not violate conditions, *id.* 38. Respondent's conditions were imposed, not accepted and would have been no less binding had he *not* "signed th[em]...and acknowledged the consequences for violating them." *Id.* 9. Whereas under the parole system, no person revoked could serve more time in prison than the term originally imposed, now every person who is incarcerated as a consequence of a supervised release violation is serving time in addition to his prison term.

Nor, despite the Government's mantra-like repetition of the phrase, does the fact that the liberty of persons subject to subsection (k) is *limited*, mean that it is "conditional" in the sense *Morrissey* used that term. When a court "revokes" a defendant's supervised release and sentences him to imprisonment, it is not rescinding or calling back an earlier grant of liberty nor reinstating an unserved portion of the prison sentence imposed on the jury's verdict. Persons on supervised release have "conditional liberty" only in the sense that others in free society does: They enjoy freedom, subject to the condition that it may be taken away if they violate a statute or court order.

The Government is of course correct that persons subject to supervised release, by virtue of that status, do not enjoy the full measure of liberties during the time that "part of the[ir] sentence" operates. Br. 5, (quoting 18 U.S.C. § 3583(a)). But their liberty is not something that has been granted, and the limitations are *imposed*, for non-punitive reasons, upon conviction, in order to improve the defendant's prospects for reintegration, largely in recognition of the legal and social disabilities that those leaving lengthy incarceration experience. S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983) (a "primary goal [of supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense").

Accordingly, the kinds of restrictions that are commonly imposed post-release that could not be on someone at absolute liberty are ones inherent in advancing the regime's supervisory goals. It is "reasonable," this Court has held, *see Samson, v. California*, 547 U.S. 843 (2006), that persons under rehabilitative supervision are searched more readily than those who have regained absolute liberty. But it does not follow—and it is incorrect—that the Fifth and Sixth Amendment rights to a fair and accurate determination of guilt for a different alleged "offense under chapter 109A..." are likewise degraded. Indeed, even with respect to the Fourth Amendment, it is unlikely a police officer's using what would normally be unconstitutionally excessive force would be made reasonable if the arrestee were on federal supervised release.

In fact, the very decisions the Government invokes in support of its status-based theory expose the error of that argument. This rule applied in

Samson and *Knights v. United States*, 534 U.S. 112, (2001), was derived from precedent establishing that prisoners have *no* reasonable privacy expectations, *Hudson v. Palmer*, 468 U.S. 517, 527 (1984); parolees' and probationers' place in the middle of the "continuum" of liberty were held to support correspondingly intermediate privacy rights. But, as explained above, the same class denied Fourth Amendment protection altogether, are understood, universally, to enjoy the full panoply of fair-trial rights if accused of committing crime while serving an incarceration term. (The one seeming exception—prison disciplinary proceedings—is not; as with parole, what is at stake is not additional punishment, but instead withdrawal of previously bestowed "good time credits," *see Wolff v. McDonnell*, 418 U.S. 539(1974); *cf. State ex rel. Bray v. Russell*, 89 Ohio 3d 132 (2000) (invalidating "bad-time" credit statute on state constitutional grounds)). The Constitution is not reasonably construed as requiring that all trial safeguards be accorded a defendant charged with a brutal killing while serving his homicide sentence in prison, but countenancing subsection (k), which authorizes life imprisonment if a judge finds it more likely than not that a defendant who *completed* a prison sentence committed a Class C felony.[6]

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[6] On the Government's theory, Congress could provide for a death sentence to be imposed based on a judge's finding of guilt for homicide at a "revocation" hearing for a defendant on supervised release for a Class E felony. That, too, would not be punishment or a "Prosecution," but a mere "administration of a previously imposed sentence" based on "post-judgment facts." The unlikelihood the Government would be "[]willing[]to follow its premise to that logical conclusion suggests that the premise itself is flawed." U.S. Br.47.

The Government at points floats the notion that the present system is not merely *like* prior regimes; but in fact *is*, in substance, a form of probation—a "split" sentence, where the defendant serves a first part in prison and a second "part" is suspended and served, "provisionally," Br. 5, outside. That is not the regime the Congress enacted or the one the Government previously described to this Court, and it would raise far-ranging problems in the vast run of federal criminal cases where a supervised release term is imposed. It would be startling enough that a statute enacted to "make[] all sentences basically determinate," *Mistretta*, 488 U.S. at 367, in fact established a regime where almost every convicted defendant receives a paradigmatic *indeterminate* sentence. But more important, treating the supervised release "part" of the sentence as if it were a suspended prison term would render unlawful sentences imposed routinely in the federal system, including the one here: In jurisdictions that permit split sentences, a sentence of three years in prison plus an additional ten years suspended is *impermissible* if the statutory maximum sentence is ten. *See, e.g.*, *Jones v. Florida*, 608 So.2d 797, 800 (1992); *Louisiana v. Brown*, 645 So.2d 1282 (La. App. 4 Cir. 1994).

But as the Government explained to the Court in *Johnson*, the supervised release term, is not imposed as punishment. Rather, its "dominant purpose" is "to afford offenders assistance in reintegration into society and rehabilitation." Br. U.S., No. 99-5153, at 15. A court's authority to revoke and further incarcerate is not central to the regime; but rather an incident Congress included to better accomplish the regime's nonpunitive purposes. *Id.* 27. Indeed, the fact that initial versions of the Sentencing Reform Act

omitted any mechanism for enforcing compliance with conditions itself attests that Congress saw supervision as an end in itself and refutes the suggestion that it had re-enacted parole. *See* Doherty, 88 N.Y.U. L.J. at 999.

Since Congress enacted what is now subsection (e)(3), providing further imprisonment as an available response to violations, it has taken care to ensure that revocation proceedings not become an alternative mechanism for punishing violations of criminal law that happen to occur while the person is under supervision. First, Congress enacted the limitations in subsection (e)(3) of the statute, which establish maximum terms of incarceration of one, two or three, or five years, depending on the severity of the defendant's offense of conviction. These ceilings, which are a small fraction of the sentences provided for the corresponding offenses, see 18 U.S.C. § 3559(a), signal that incarceration is not meant to be—and cannot supply—punishment for a serious or recidivist offense. And these finite and relatively low ceilings are suited to the informal and holistic character of the proceeding at which sanctions are decided.

That signal is reinforced by the fact that the graduated maximums are linked to the seriousness of the conviction offense, not the conduct underlying the violation. And it is further reaffirmed by the broad discretion courts are granted: they need not revoke in response to every proven violation, or impose the maximum when they do decide to order incarceration. Congress conspicuously omitted "the need for just punishment," 18 U.S.C. § 3559(a)(2)(A), from the list of considerations to be taken into account when imposing supervised release and when deciding

whether and how to respond to violations—on the understanding that the defendant's original prison term would have fully accounted for that. See 18 U.S.C. § 3583(c), (e). Congress further directed courts to take account of the individual's educational, medical, and vocational needs and "impose a sentence sufficient, [that is] but not greater than necessary." *id.* § 3553(a)(2)(D), (a).

Finally, as the Government emphasized in *Johnson*, the power to sanction may not be understood in isolation from "the other powers granted to the district court in Section 3583(e), all of which are designed to ensure a successful transition for the defendant from prison to society outside prison...The district court [is] granted a continuing supervisory authority, during the entire period of supervised release, to monitor the progress of the offender and to adjust the conditions of supervised release to assure his successful reentry into the community." *Johnson* Br. 27.

That is largely how the regime operated when this Court decided *Johnson*. And that is how it operates with respect to every defendant on supervised release *except* those in respondent's position. Subsection (k), of course, does none of this. It strips district courts of all discretion, mandating that revocation occur, without regard to considerations a court is otherwise required to consider, 18 U.S.C. § 3583(e), and a lengthy prison sentence be imposed—not "a short period of reimprisonment, followed by a new opportunity ... to achieve successful reintegration," *Johnson* Br. 31. Life sentences aside, the subsection (k) *minimum* equals the maximum that may be imposed on *any* defendant convicted of Class A felonies who commits a second (or third) Class A

felony on supervised release. And punishment is tied exclusively to the "offense" the defendant is alleged to have committed while on supervised release.

In light of this, it is unsurprising that the Government does not echo the dissenting opinion below in claiming that this Court's *Johnson* decision "already" acquitted the subsection (k) regime of violating the Sixth Amendment. See Pet. App. 34a. Neither subsection (k), which was enacted in 2006, nor any provision like it was before the Court when *Johnson* was decided. Nor was *any* provision of Section 3583(e) challenged on Sixth Amendment grounds. (Because the principal ground for revocation was Johnson's recent state court conviction, 529 U.S. at 697, no plausible Sixth Amendment challenge could have been raised, *see Almendarez-Torres*). Indeed, the petitioner raised no challenge, constitutional or otherwise, to the incarceration portion of his revocation sentence. The only issue before the Court concerned court-imposed *supervision*: whether a district court was prohibited from imposing *further* supervision if it found a violation and sent the defendant to prison. This Court resolved that question on statutory grounds, reasoning that the text of subsection (e)(3) did not require that reading, *i.e.*, that "revoking" supervised release status did not necessarily mean "terminating" it, 529 U.S. at 704, noting that its reading comported with the purposes and design of the supervised release regime, *id.* at 708-10.

The Court did not answer the one constitutional question that was raised: Whether, for Ex Post Facto Clause purposes, a defendant-unfriendly amendment to the supervised release regime should apply to only those whose sentences are imposed thereafter or

whether it may also apply to those whose violation conduct post-dates the amendment. The answer the *Johnson* signaled, that the sanction should be "attribute[d]," 529 U.S. at 701, to the conviction, was the position that both parties urged the Court to adopt, and one of the grounds was that doing so would avoid "serious constitutional difficulties," *id.* at 700.

The Government's inference from that discussion and—that the Court viewed the supervised release revocation regime, including the limited power to incarcerate, as "unproblematic," Br. 21—is not implausible or incorrect. The sanction regime then in effect was more modest than the one that now governs—sentences were limited by both the offense-based ceilings and by "the term of supervised release," imposed on the individual defendant, *id.* at 703, and the subsection(e)(3) ceilings aggregated all revocation imprisonments; the Government took pains to tell the Court its "view... [that] an offender like [Johnson], who was convicted of a Class D felony faces only a maximum of two years' reimprisonment for all ... violations of supervised release," explaining "[a]t some point the district court's authority over an offender [must] come[] to an end." *Johnson* Br. 31 n.24.

But it is utterly implausible to read the Court's opinion as issuing Congress *carte blanche* to insert crimes into Section 3583, smoothing the path to easy—but unreliable and unjust—convictions, by having them occur in "revocation" proceedings. On the contrary, as the court of appeals correctly recognized, the kinds of "serious constitutional problems" that inhere in pursuing punishment for post-conviction conduct through informal revocation hearings are the ones that condemn subsection (k).

III. The Government's Remedial Proposal Should be Rejected

The Government finally posits that, accepting that subsection (k) is unconstitutional, the court of appeals erred in holding it "facially" so, Br. 51, and this Court, "at a minimum," *id.*, should allow the regime to persist, albeit with juries participating in the revocation proceedings.

The Government is wrong. The subsection (k) regime *is* facially unconstitutional, as that term is ordinarily understood—indeed on its most restrictive understanding: There is *no set of defendants* to whom the regime Congress enacted may be constitutionally applied. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). And the Government's proposed "remedy" is neither constitutionally sufficient nor proper.

The constitutional defect of the subsection (k) regime is that it brings the full, maximal power of the criminal law to bear in a proceeding that lacks any of the incidents and protections of a criminal trial, a proceeding in fact designed for entirely different, nonpunitive supervisory purposes. The only plainly adequate remedy for *that* violation one that: requires prosecutors to pursue persons believed to have committed offenses under the enumerated chapters of Title 18 in criminal trials; forbids judges from themselves initiating (and then presiding over) proceedings where defendants face life sentences, ostensibly for breaching the court's trust; and ensures that defendants will not be threatened with a second "independent prosecution," Br. 48, at which the Government pursued further punishment for the same federal offense. *Cf. Dixon*, 509 U.S. at 697 (Opinion of Scalia, J.).

That the violations respondent's Fifth and Sixth Amendment were manifest and sufficient to overturn his sentence is no basis for assuming that the proposed replacement—denying the many historic safeguards—would comply with the Constitution, a requirement for any "remedy" a court could impose. The interests in quick, flexible, and informal hearings that occur under the very different and far less draconian subsection (e)(3) revocation regime, are largely inapplicable and adequate to deny full protections where life-long liberty deprivation is on the table. And cases like this one, where such weighty individual interests are at stake are not the proper forum for conducting experiments in how *little* process may be due.

Moreover, the hybrid proceeding the Government invites the Court to launch would be an untested *judicial* experiment. The statutory scheme does not establish that Congress would readily replace the benefits of a unitary, holistic revocation process, with an as-yet undetermined bi-furcated proceeding, in order to pursue the subsection (k) punishments. The remedy the court of appeals adopted, in contrast, enables the Government both to punish and deter repeat offenses by those on supervised release the same way it addresses re-offense by persons who have regained absolute liberty and those who have not yet attained release—and to address breaches of trust through the same subsection (e)(3) mechanism Congress adjudged adequate for undeniably serious violations.

Conclusion

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 17-1672

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

ANDRE RALPH HAYMOND, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF FAMM AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

ANDRE RALPH HAYMOND, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR FAMM AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

Amici curiae are FAMM and the National Association of Criminal Defense Lawyers (NACDL).*

FAMM is a national, nonprofit, nonpartisan organization of over 75,000 members. FAMM was founded in 1991 to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. Today, FAMM pursues a

* No counsel for a party authored this brief in whole or in part, and no counsel or entity other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. *Amici* received the government's consent to file this brief by letter and have filed that letter with the Clerk. Respondent's consent to the filing of *amicus* briefs is filed with the Clerk.

broader mission of creating a more fair and effective justice system that respects American values of individual accountability and dignity while keeping communities safe. By mobilizing and sharing the stories of prisoners and their families who have been adversely affected by unjust sentences and prison polices, FAMM gives voice to incarcerated individuals, their families, and their communities.

NACDL is a nonprofit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges.

Amici advance their missions in several ways, including through *amicus* filings in this Court and other courts throughout the country. *Amici* are filing this brief because this case illustrates the heavy and unnecessary toll extracted by mandatory sentencing laws. The district court sentenced respondent Andre Haymond to a mandatory, five-year term of reimprisonment after finding, by a preponderance of the evidence based on "less than clear" testimony and "circumstantial" proof, that he had possessed a few thumbnail images of child pornography while on supervised release. Pet. App. 64a–65a. The district court was explicit that "[i]f this were a criminal trial [on possession] and the Court were the jury, the United States would have lost." Pet. App. 68a. The court also expressed serious misgivings about the mandatory minimum penalty, noting if 18 U.S.C. § 3583(k) did not require at least a five-year sentence, "the court would have looked

at this as a grade B violation and probably would have sentenced in the range of two years or less." Pet. App. 15a. This case accordingly highlights the grave unfairness of Section 3583(k), and the inconsistency between its requirements and the constitutional guarantees of due process and the right to trial by jury.

SUMMARY OF ARGUMENT

The constitutional problems in this case stem from a unique feature of a unique federal criminal statute.

In most cases, when a jury convicts a defendant (or the defendant enters a knowing and intelligent guilty plea), the verdict authorizes not only an initial term of imprisonment, but also a period of supervised release. This period of post-imprisonment conditional liberty is "overseen by the sentencing court," *Johnson v. United States*, 529 U.S. 694, 697 (2000), which administers supervised release within the limits of the jury's mandate. If the defendant violates the terms of her supervised release, then the sentencing court has the authority to return the defendant to prison. A federal statute, 18 U.S.C. § 3583(e)(3), ties the maximum potential term of reimprisonment to the offense of conviction, with a maximum possible term of five years for serious offenders. Under this system, the jury's verdict alone authorizes the potential sentences the defendant may receive—both initially, and if the defendant commits a supervised release violation.

The statute at issue here, 18 U.S.C. § 3583(k), is different. It provides that the sentencing court must sentence the defendant to *at least* five years' reimprisonment if the court finds, by a preponderance of the reliable evidence presented at a summary hearing—that the defendant committed one of a specified set of statutory offenses

while on supervised release. That requirement applies even though the jury's verdict authorizes *at most* five years' reimprisonment for serious offenders, and much less for others.

That unique aspect of Section 3583(k) is what renders it unconstitutional. As this Court's precedents make clear, "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham v. California*, 549 U.S. 270, 281 (2007). That principle applies both to statutes that increase the maximum potential term of imprisonment as well as those that trigger or increase any minimum. *Alleyne v. United States*, 570 U.S. 99, 115–16 (2013). And that is just what Section 3583(k) does. As this Court has made clear, supervised release, including the term of reimprisonment in the event of a violation, is part of the punishment for the original offense of conviction. *See Johnson*, 529 U.S. at 700; *see also* 18 U.S.C. § 3583(a) (supervised release is "part of the sentence"). And Section 3583(k) increases that term of reimprisonment beyond the term authorized by the jury verdict, based on facts "found by . . . a judge . . . merely by a preponderance of the evidence." *Cunningham*, 549 U.S. at 281.

The facts of this case well illustrate the problem. The jury convicted respondent of a violation of 18 U.S.C. § 2252(a)(4)(B), which is a Class C felony. *See* 18 U.S.C. § 3559(a)(3) (classifications of federal offenses). That conviction authorized respondent's initial prison term (38 months), which fell within the statutory range of 0 to 10 years. *See id.* § 2252(b)(2). The conviction also authorized the term of supervised release that the judge imposed—10 years, within the statutory range of five years to life. *See id.* § 3583(k). Finally, and most pertinent here, the

conviction for committing a Class C felony authorized imposition of up to two *additional* years' imprisonment in the event that respondent were to violate a condition of his supervised release. *See id.* § 3583(e)(3).

Section 3583(k) would require that respondent serve a much longer term of reimprisonment, based solely on judge-found facts. In 2015, respondent's probation officer reported several supervised release violations. The district court then conducted a revocation hearing under Federal Rule of Criminal Procedure 32.1(b) to determine whether respondent had committed one of the offenses specified in Section 3583(k). This proceeding looked like a trial, but lacked many of the accompanying procedural safeguards. As the government notes, Br. 13, respondent called several witnesses (including an expert) and provided testimony, and both respondent and the government filed extensive legal briefs about whether his conduct amounted to the commission of one of those offenses. The court then found, by a preponderance of the reliable evidence,[1] that Haymond had committed a predicate offense under Section 3583(k), which triggered a mandatory prison term more than double the maximum term of reimprisonment authorized by the jury's verdict for the offense of conviction.

The government's brief largely sails past this problem, focusing instead on a defense of the general proposition that the Fifth and Sixth Amendments do not forbid the

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[1] The Federal Rules of Evidence do not apply at a revocation hearing or at sentencings. *See* Fed. R. Evid. 1101(d)(3). The admissibility of evidence at a revocation hearing is governed not by the Rules of Evidence, but by a minimal due process standard of reliability. *See Gagnon v. Scarpelli*, 411 U. S. 778, 786 (1973).

imposition of a prison term for a supervised release violation. *See* Br. 23–28. *Amici* do not dispute that point. But the statute at issue here does something more: It *increases* the prison term for a supervised release violation term beyond what the jury's verdict authorizes. And the fact that this constitutional flaw occurs in the context of supervised release revocation changes nothing, because "[t]he dispositive question . . . 'is one not of form, but of effect.'" *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)). Indeed, this Court has already suggested that it would be unconstitutional to increase post-revocation penalties based on something other than the "original conviction." *See Johnson*, 529 U.S. at 701.

For these reasons, Section 3583(k) is unconstitutional, and the judgment below should be affirmed.

ARGUMENT

18 U.S.C. § 3583(K) IMPERMISSIBLY INCREASES A DEFENDANT'S SENTENCE BASED ON JUDGE-FOUND FACTS ABOUT A NEW AND DIFFERENT CRIMINAL OFFENSE.

This Court has already determined that any term of supervised release and any penalty for violating supervised release are part of the sentence for the initial offense. *See Johnson*, 529 U.S. at 700. This Court's precedents also make clear that a defendant's sentence must be within the range authorized by the jury's verdict. *See Cunningham*, 549 U.S. at 281. Accordingly, the punishment for a violation of supervised release must be within the statutory range for that violation, which is in turn authorized by the plea or jury verdict underlying the original offense of conviction.

A. The Fifth and Sixth Amendments Do Not Permit A Defendant's Sentence To Be Increased Beyond What The Jury Authorized Based on Judge-Found Facts.

1. This Court has repeatedly instructed that "a judge may impose" a sentence "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (emphasis in original); *accord Cunningham*, 549 U.S. at 288; *Ring*, 536 U.S. at 586. "[W]hile judges may exercise discretion in sentencing, they may not 'inflic[t] punishment that the jury's verdict alone does not allow.'" *Southern Union Co. v. United States*, 567 U.S. 343, 348 (2012) (quoting *Blakely*, 542 U.S. at 304). The Fifth and Sixth Amendments therefore require that any fact that increases the maximum or minimum penalty for a crime "must be submitted to the jury." *Alleyne*, 570 U.S. at 108.

This Court has also rejected the notion that a necessary fact for a heightened penalty can escape the purview of this rule merely because it is labeled as a sentencing enhancement. If a defendant's punishment is contingent on the finding of a fact, "that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602; *accord Sattazahn v. Pennsylvania*, 537 U.S. 101, 110–12 (2003). This principle applies "whether the statute calls them elements of the offense, sentencing factors, or Mary Jane." *Ring*, 536 U.S. at 610 (Scalia, J., concurring). The question "is one not of form, but of effect." *Apprendi*, 530 U.S. at 494.

The upshot of this constitutional doctrine is that the jury is not permitted to "mak[e] a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542

U.S. at 306. But that is precisely how the challenged provision of 18 U.S.C. § 3583(k) operates. Unlike all other provisions of the supervised release statute, Section 3583(k) requires judicial factfinding that not only establishes the existence of a supervised release violation (which is not constitutionally problematic) but also increases the range of penalties that must be imposed upon that finding (which is constitutionally prohibited). *See United States v. Booker*, 543 U.S. 220, 235 (2005); *Blakely*, 542 U.S. at 305.

In finding the defendant in this case guilty of violating 18 U.S.C. § 2252(a)(4)(B) beyond a reasonable doubt, the jury authorized "imprison[ment] not more than 10 years," 18 U.S.C. § 2252(b)(2),[2] and a term of supervised release between five years and life, 18 U.S.C. § 3583(k); *see also* 18 U.S.C. § 3583(a) (supervised release is "part of the sentence"). Further, by convicting the defendant of a Class C felony based on the facts that it found beyond a reasonable doubt, the jury authorized a term of imprisonment for any revocation of supervised release of up to "2 years in prison." 18 U.S.C. § 3583(e)(3). Under that statute, the potential terms of imprisonment for supervised release violations flow from the jury's verdict (or guilty plea): For Class A felonies, a defendant can receive up to five years; for Class B felonies, up to three years; for Class C and D felonies, up to two years, and for all others, up to one year. *Ibid.*

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[2] Monetary penalties and forfeiture are also permitted, *see* 18 U.S.C. §§ 2252(b)(2), 2253, 2259(a), but were not applied in this case. The district court did impose a $100 special assessment, as required by 18 U.S.C. § 3013(a)(2). J. & Commitment, *United States v. Haymond*, Crim. No. 08-201, Dkt. No. 150 (Jun. 21, 2010).

Respondent, however, received a higher sentence for his supervised release violation, based on the last two sentences of Section 3583(k). That statute requires the judge to impose a sentence of at least five years' imprisonment, and potentially as long as life, "only upon finding [of] some additional fact." *Blakely*, 542 U.S. at 305. That additional fact is that the defendant has "commit[ted] any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed." 18 U.S.C. § 3583(k).[3] Because that additional fact increased the sentencing range for respondent's supervised release violation, the Constitution required a jury, not a judge, to make that finding.

The contrast between the relevant provisions of Section 3583 highlights why Section 3583(k) violates the Fifth and Sixth Amendments. Section 3583(e)(3)—and the idea of revocation generally—is consistent with the Sixth Amendment principle recognized in *Apprendi* and the cases that followed because it permits imposition of prison terms within limits set by the jury's findings. *See, e.g.*, *United States v. McIntosh*, 630 F.3d 699, 703 (7th Cir. 2011) (reimprisonment for a violation of supervised release pursuant to Section 3583(e)(3) does not create "an additional penalty on top of a defendant's original sentence" that "go[es] beyond the statutory maximum . . . im-

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[3] This case does not present the question whether the increased penalty set forth in Section 3583(k) may constitutionally be imposed on a releasee if the fact of having committed a specified additional offense were to be established by a judgment of conviction for that new offense, rather than by evidence of criminal conduct with no new conviction. *Cf. Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

posed by the sentencing court following a defendant's conviction"). Under Section 3583(e)(3), the jury's verdict as to a defendant's initial offense establishes the outer limits of the consequences of any future supervised release violation, and the judge's finding of a supervised release violation simply triggers a sentence within that jury-authorized range. Section 3583(k), by contrast, creates a mandatory, elevated sentence range based not on the original offense of conviction, but on post-sentencing conduct found by a judge. This outcome is unlawful, because "the jury's verdict alone does not authorize the sentence." *Blakely*, 542 U.S. at 305.

Moreover, Section 3583(k)'s mandatory-sentencing requirement distinguishes it from the discretionary scheme established by the rest of the supervised release statute and accompanying guidelines. Section 3583(k) contains the *only* provision in the supervised release statute that imposes a mandatory sentence.[4] All other post-revocation sentences are governed by Section 3583(e)(3), which gives judges discretion over whether to imprison defendants at all within statutorily-specified ranges set by the original offense of conviction. Similarly, Chapter 7 of the Sentencing Guidelines provides advisory policy statements regarding the period of reincarceration attendant

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[4] *Amici* do not understand 18 U.S.C. § 3583(g) to require imposition of any minimum term of imprisonment in the cases covered by that provision. If it did, the same issue presented here would seemingly arise. In any event, that provision is not before the Court in the present case and need not be further addressed.

to different types of violations.[5] *See* U.S.S.G. § 7B1.4. This discretion—which is absent in Section 3583(k)—is critical to the very purpose of supervised release. *See Johnson*, 529 U.S. at 708–09 ("The congressional policy in providing for a term of supervised release after incarceration is to improve the odds of a successful transition from prison to liberty . . . . Congress aimed, then to use the district courts' discretionary judgment to those who needed it the most.").[6]

2. The government's opening brief ignores these straightforward conclusions and focuses largely on defending issues that *amici* do not dispute, such as the ability of judges to revoke supervised release in a similar manner to their ability to revoke probation or parole. In focusing on these uncontroversial issues, the government sidesteps this Court's mandate that "all facts legally essential to the punishment" must be proven beyond a reasonable doubt to a jury. *Blakely*, 542 U.S. at 313.

a. The government's lengthy arguments that the Sixth Amendment does not apply to "the revocation of conditional liberty" are nonresponsive to the question

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[5] Courts of Appeals that have upheld the constitutionality of post-revocation sentencing for violations of supervised release against *Apprendi*-type challenges have often based their decisions on the discretionary nature of the penalty. *See, e.g., United States v. Contreras-Martinez*, 409 F.3d 1236, 1243 (10th Cir. 2005).

[6] Importantly, the discretion afforded to judges under Section 3583(e)(3) does not infringe upon "the jury's traditional function of findings facts essential to the lawful imposition of the penalty." *Blakely*, 542 U.S. at 309. Section 3583(k), on the other hand, infringes not only on the traditional role of the jury but also that of the judge.

presented. Br. at 23–31. *Amici* are not arguing that judicial factfinding as to the *existence* of a supervised release violation necessarily runs afoul of constitutional safeguards. As noted above, that factfinding simply triggers the imposition of a sentence authorized by the jury's verdict. *See* 18 U.S.C. § 3583(e)(3). The problem with Section 3583(k) instead is that it impermissibly *increased the penalty* for respondent's violation of supervised release, which is "a part of the original sentence imposed by the sentencing court following a defendant's conviction by a jury based on proof beyond a reasonable doubt." *McIntosh*, 630 F.3d at 703.

Take, for example, Cornell Johnson, who was originally convicted of a Class D felony and sentenced to 25 months' imprisonment and three years' supervised release. *Johnson*, 529 U.S. at 697. Johnson subsequently violated the conditions of his supervised release by committing another crime. *Id.* at 697. Under Section 3583(e)(3), the statutory maximum for this violation (two years) was determined by the fact that the jury *originally* convicted him of a Class D felony—not the nature of the *new* crime underlying his violation. In other words, Johnson's "new prison term [was] limited . . . according to the gravity of the original offense." *Id.* at 712. And the judge's factfinding simply triggered a reimprisonment range already established by the jury's verdict. As a result, this Court explained that it was no "mere formalism to link the second prison sentence to the initial offense." *Id.* at 708.

Here, however, Haymond's "second prison sentence" has nothing to do with his original offense of conviction; instead, it has everything to do with the *new* crime he was accused of committing while on supervised release. Even though Section 3583(e)(3) provides a two-year maximum

term of imprisonment for Class C felonies, Haymond received a sentence of five years based solely on the judge's finding that he had committed a specific type of supervised release violation. While Johnson's punishment for violating supervised release was authorized by the jury's verdict, Haymond's was not (and could not have been).

b. The government also misses the mark in citing caselaw regarding the revocation of probation and parole, as well as "[h]istorical practice" regarding probation and parole, in defending the constitutionality of Section 3583(k). *See* Br. 31–39. Again, Section 3583(k)'s constitutional flaw is not that it allows for the revocation of supervised release by a judge, without all the procedural protections of a new criminal trial.[7] Rather, Section 3583(k)'s flaw is its requirement that the district court impose penalties for certain supervised release violations within an elevated sentencing range, including an otherwise inapplicable mandatory minimum, based on the finding of additional facts unrelated to the jury's initial verdict.

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[7] *See Black v. Romano*, 471 U.S. 606, 607 (1985) (considering "whether the Due Process Clause of the Fourteenth Amendment generally requires a sentencing court to indicate that it has considered alternatives to incarceration before *revoking* probation") (emphasis added); *Gagnon*, 411 U.S. at 779 (addressing the "questions whether a previously sentenced probationer is entitled to a hearing when his probation is *revoked* and, if so, whether he is entitled to be represented by appointed counsel at such a hearing") (emphasis added); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (considering whether "the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard prior to *revoking* his parole" (emphasis added)).

The government's references to parole ultimately support *amici*'s position, because—in contrast to the penalties imposed pursuant to Section 3583(k)—the penalties imposed for violating parole fall within a range established by "facts reflected in the jury verdict." *Blakely*, 542 U.S. at 303. Like supervised release, revocation of parole may call for the deprivation of "the conditional liberty properly dependent on observance" of certain conditions imposed on the individual. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Revocation precedes its consequences, which in some cases can involve the imposition of a term of reimprisonment. But in the parole context, the term of reimprisonment after revocation is the "remainder of the term for which [the defendant] was sentenced." 18 U.S.C. § 4207 (1970); *see also* 18 U.S.C. §§ 4210(a), (b)(2) (1982).[8] That remainder term necessarily flows from the jury's verdict.

Probation operations similarly. After revocation, the district court "resentence[s] the defendant" based on the same statutory range that was determined by the jury's original verdict. 18 U.S.C. § 3565(a)(2); *see United States v. Holdsworth*, 830 F.3d 779, 783 (8th Cir. 2016) (district court has power "to sentence a probation violator within the range of sentences available at the time of the initial sentence" (citations omitted)). Under no circumstances

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[8] The Sentencing Reform Act of 1984 eliminated parole for offenses committed after November 1, 1987. Pub. L. No. 98-473, Tit. II, ch. II, § 212(a)(2) 98 Stat. 1987, 1999. To comply with the Ex Post Facto Clause, Congress has extended the authority of the Parole Commission to administer parole for those serving pre-SRA sentences. *See* Pub. L. No. 115-274, § 2, 132 Stat. 4160, 4160.

can the revocation sentence exceed the statutory maximum for the original offense. *See, e.g.*, *United States v. Tatum*, 760 F.3d 696, 697 (7th Cir. 2014).

In short, in the parole or probation contexts, the district court cannot impose a term of imprisonment above the sentencing range authorized by the jury verdict (or guilty plea) for the original offense. More specifically, the district court cannot trigger a mandatory heightened range of penalties by finding additional facts regarding the particular manner in which the defendant violated the terms of his or her conditional release.

c. The government's argument that there is a talismanic distinction between the "imposition" of a sentence (which is protected by the jury trial right) and the "administration" of a sentence through post-conviction proceedings (which is not), is similarly ill-conceived. *See* Br. 23-24, 30-31. The government cites one case for this proposition (*Oregon v. Ice*), and it refutes the government's distinction. In *Ice*, which the government characterizes as a case about "administering . . . sentences," the Court repeatedly stated that it was evaluating the constitutionality of "a judge's *imposition* of consecutive, rather than concurrent, sentences." 555 U.S. 160, 169 (2009) (emphasis added); *see also id.* at 163, 164, 165, 166, 168, 171.

Moreover, the government's attempt to ascribe constitutional significance to a temporal distinction should be rejected. The constitutional problem presented here was not at issue in *Ice*. There, the jury's guilty verdicts on six distinct counts authorized separate sentences for each offense, and the only issue was the sentencing court's authority to determine how those already-authorized sentences should be served. *Id.* at 165–66. Section 3583(k), by contrast, does increase penalties beyond the bounds of

the jury's verdict, and so "implicates *Apprendi*'s core concern: a legislative attempt to 'remove from the [province of the] jury' the determination of facts that warrant punishment for a specific statutory offense." *Id.* at 170 (alterations in original) (quoting *Apprendi*, 530 U.S. at 490).

d. Finally, the government ignores *Alleyne* in urging that Section 3583(k)'s mandatory minimum of five years is constitutionally insignificant because, "[a]t respondent's initial sentencing, the court was authorized to impose a sentence of zero to ten years of imprisonment, 18 U.S.C. 2252(b)(2)." Br. 46. As this Court explained in *Alleyne*, "when a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact." 570 U.S. at 114–15.

What is more, the government's apparent position—that all post-conviction consequences can be characterized as the sentencing court's implementation of the original sentence—proves far too much. *See* Br. 46 ("The court simply implemented the sentence that respondent received initially and was 'exposed' to all along."). After all, in each of the cases in which this Court has struck down statutes enhancing sentences based on facts not found by a jury beyond a reasonable doubt—going all the way back to *Apprendi* itself—those very statutes could also be semantically recast as "the sentence that respondent . . . was 'exposed' to all along" by virtue of his original conviction. U.S. Br. 46. In essence, the government's argument is that a conviction authorizes the maximum sentence the statute permitted if every unfavorable and sentence-enhancing fact were found by a jury. But "the relevant 'statutory maximum' is not the maximum sentence a

judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. at 303–04.

B. The Mandatory Sentencing Enhancement in Section 3583(k) Is Not Part of The Penalty for The Initial offense and Therefore Violates Due Process.

In *Johnson v. United States*, the Court concluded that both supervised release and penalties for revocation are part of the sentence for an offense. 529 U.S. at 624 ("We . . . attribute post-revocation penalties to the original conviction."). This outcome was appropriate under the statutory regime then in place, where Section 3583(e)(3) always provided the upper limits on post-revocation penalties based on the severity of the initial crime of conviction.

Section 3583(k)'s later-enacted requirement that a judge impose a mandatory enhanced penalty based on judge-found facts about a *different* offense contravenes that foundational underpinning of *Johnson*. As discussed, *infra* at 12–15, for parole, probation, and supervisees like Johnson, the upper limit of their period of reimprisonment after revocation of conditional liberty is defined by the jury verdict. For respondent, by contrast, the upper limit for reimprisonment was set by the judge's findings regarding a different, uncharged criminal offense, which resulted in a sentencing range that looked nothing like the original sentencing range. Thus, Section 3583(k)'s penalties cannot be said to be "part of the penalty for the initial offense." *Johnson*, 529 U.S. at 700.

Punishing the defendant for an offense other than the crime of conviction does not just invalidate the logic underpinning *Johnson*—it also raises serious due process concerns. *See Blakely*, 542 U.S. at 306 (rejecting a system in which "a judge could sentence a man for committing

murder even if the jury convicted him only of illegally possessing the firearm used to commit it"). The penalty under Section 3583(k), which not only requires a minimum of five years in prison but also allows for a life sentence, is commensurate with the sentencing scheme for Class A felonies. *See* 18 U.S.C. § 3559(a)(1). But no jury ever convicted respondent of a Class A offense. Adopting the government's construction of Section 3583(k) would improperly bless a sentencing regime in which a judge effectively can sentence a defendant to a draconian, previously-unavailable prison term for a new criminal offense. The Court has rejected previous efforts to allow judge-found facts to dramatically alter a defendant's sentencing range. *See United States v. O'Brien*, 560 U.S. 218, 229 (2010) (concluding that use of a machine gun was an "element" of 18 U.S.C. § 924(c) as opposed to a "sentencing factor," in part, because such a finding can "vault[] a defendant's mandatory minimum sentence from 5 to 30 years"). Permitting that outcome here by upholding Section 3583(k) would allow the "tail"—an additional finding of fact—to "wag the dog of the substantive offense," in violation of the Due Process Clause. *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting) (quotations and alterations omitted); *see also ibid.* ("[T]hat is the kind of problem that the Due Process Clause is well suited to cure.").

* * * * *

As this Court has recognized, the "ancient guarantee" of the right to trial by jury is the "great bulwark of our civil and political liberties." *Booker*, 543 U.S. at 237–39 (quotations and alterations omitted). The Framers understood—and feared—that this "jury right could be lost not only by gross denial, but by erosion." *Apprendi*, 530 U.S. at 483 (quoting *Jones v. United States*, 526 U.S. 227, 247–

48 (1999)). As a result, while policy and statutory procedure may evolve, "new sentencing practice" may not supersede the constitutional guarantee that the jury will always "stand between the individual and the power of the government." *Booker*, 543 U.S. at 237. For the reasons explained above, Section 3583(k) is inconsistent with this guarantee and violates both the Fifth and Sixth Amendments.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 17-1672

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ANDRE RALPH HAYMOND,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF SOCIAL SCIENCE AND LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici are eighteen scholars across six disciplines whose work includes the leading empirical studies of persons convicted of sexual offenses and the laws applied to them. The Appendix identifies them and describes their work.

Amici believe it critical that judicial decisions affecting constitutional rights be grounded on an accurate understanding of empirical realities. At the very least, they should not propagate misunderstandings. Unfortunately, such misunderstandings about the re-offense risk posed by people who have been convicted of sexual offenses are not only commonplace, but often traceable to language in early opinions of this Court. The Government invites the Court to repeat that language. But the Court's mistaken statements have been consequential. Amici wish to provide the Court with accurate descriptions of the scientific studies addressing these subjects so that it may correct rather than repeat the misunderstandings expressed in earlier opinions.[1]

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[1] No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented in writing to the filing of this brief.

SUMMARY OF ARGUMENT

Mr. Haymond was an 18-year-old community college student when an FBI undercover agent using a computer file sharing program accessed seven sexually explicit images of pubescent boys on his computer.[2] *United States v. Haymond*, 672 F.3d 948, 950-51 (10th Cir. 2012). Mr. Haymond was convicted of one count of possession of child pornography in violation of 18 U.S.C. §§ 2252(a)(4)(B) and (b)(2). *United States v. Haymond*, 869 F.3d 1153, 1156 (10th Cir. 2017). The district court sentenced him to thirty-eight months in prison and a ten-year term of supervised release, which began in April of 2013. *Id.* at 1156. A Probation Officer search of his Android phone in October of 2015 led to the district court's finding that "it was more likely than not" that he knowingly possessed thirteen images of child pornography, in violation of his supervised release conditions. *Id.* at 1156-57. The court observed that the government's evidence was insufficient to show knowing possession beyond a reasonable doubt. *See* Petitioner's Appendix (Pet. App.) at 68a. The Tenth Circuit observed it was "a close case" even under the preponderance standard applied to supervised release violations. *Haymond,* 869 F.3d at 1159.

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[2] The government's experts testified the boys in question were between 12 and 14 years old. *Haymond*, 672 F.3d at 953.

Section 3583(e)(3),[3] which usually governs revocation of supervised release, allows the court to return a violator to prison if it finds by a preponderance of the evidence that he "violated a condition of supervised release." But it does not *require* the court to return the violator to prison for any particular period, or at all. It does set the maximum term the court may impose by reference to the seriousness of the original crime of conviction, not the seriousness of the violation: the longer the maximum term of imprisonment permitted for the original crime of conviction, the longer is the maximum term of re-imprisonment that may be imposed for the supervised release violation.[4] Thus the "gravity of the initial offense determines the maximum term of re-imprisonment," which supplies the "link" between "the second prison sentence [and] the initial offense." *Johnson v. United States*, 529 U.S. 694, 708 (2000). That link is required to avoid "the serious constitutional questions that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release." *Id.* at 700. Among the serious constitutional problems that would arise, if reimprisonment were imposed for the violation, is that "the violative conduct . . . need only be found by a judge

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[3] All statutory references are to Title 18 of the U.S. Code, unless otherwise specified.

[4] Under § 3583(e)(3), the maximum term of re-imprisonment depends on the "class" of the felony. A felony is ordinarily graded in Classes A through E based on the severity of the maximum term of imprisonment that may be imposed for it, § 3559(a).

under the preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Id.*

That constitutionally essential link is broken, however, for the sexual offenses listed in § 3583(k). Non-production child pornography offenses, referenced here as possession[5], account for most of the prosecutions brought for all the listed offenses combined. The maximum term of imprisonment for Mr. Haymond's possession offense, §§ 2252(a)(4)(B) and (b)(2), is ten years. It is therefore a Class C felony (§ 3559(a)(3)), with a two-year maximum sentence for any violation of supervised release conditions under the usual rule of § 3583(e)(3), and no minimum. But because he was accused of violating his supervised release condition with a second possession offense, under § 3583(k) he was subject to a *minimum* prison term of five years, with a maximum of *life*. In the Government's view, this new sentence is additional punishment for his original crime of conviction, which

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[5] Possession, receipt, and distribution of child pornography are usually grouped together as non-production offenses, because for most defendants they do not describe different conduct. For this reason, we often refer to the entire group of non-production offenses as "possession". Possession generally requires receipt, and possession defendants generally obtain images through file sharing programs, which makes them potentially guilty of distribution. Although possession is the most common charge brought against non-production offenders, 97.5% of them could have been charged with receipt or distribution. U.S. Sentencing Comm'n, 2012 Report to the Congress: Federal Child Pornography Offenses (hereinafter, "Sentencing Commission Report"), 127, 146-17 (2012), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf.

means it would not foreclose a separate prosecution for the second offense itself.

This extraordinarily harsh provision sets a sentencing range for Mr. Haymond's supervision violation that is entirely disproportionate to the sentencing range for his crime of conviction, which has no minimum sentence, and a maximum of ten years. Even a second conviction for possession of child pornography carries a maximum sentence of twenty years, not life (§ 2252(b)(2). The sentencing judge in Mr. Haymond's case stated that he would have sentenced him to two years or less were he not bound by the five-year mandatory minimum. *Haymond*, 869 F.3d at 1162.

Because § 3583(k) provides for a sentencing range for the supervised release violation that is entirely unbound by the sentencing range for the crime of conviction, it cannot possibly be understood as part of the sentence for it. To the contrary, the section's much harsher sentencing range is triggered by the court's conclusion that the offender committed one of the particular offenses the section specifies for such treatment. It could not be clearer that § 3583(k) imposes punishment for that second sexual offense, not for the first. Thus, the provision necessarily raises–and fails–the "serious constitutional questions" the Court was able to avoid in *Johnson*.

No similar regime would apply to a bank robber convicted under 18 U.S.C. § 2113, who repeats that crime while on supervised release. He would face neither the possibility of a life sentence for his supervised release violation, nor a mandatory minimum five-year term. His violation, governed by the

normal rule, would carry a maximum term of two years, under § 3583(e)(3), as it is not punishment for the second robbery but the delayed imposition of punishment for the first, as conceived by *Johnson*.[6] Of course, he could be prosecuted for the second robbery, and if convicted be subject to any sentencing provisions triggered by this re-offense history. But if the factfinder was not persuaded of his guilt beyond a reasonable doubt, he could not be punished for the second offense in addition to the first. The question this case presents is whether the Constitution permits sexual offenders to be treated differently, by subjecting them to punishment for the second offense without the same Fifth and Sixth Amendment protections.

The difference in their treatment is exacerbated by other supervised release rules that only apply to sexual offenders. Supervised release is not required for most federal offenders, and in any event is usually limited to five years. § 3583(b). In contrast, those convicted of sexual offenses must receive a *minimum* supervised release term of five years and may be sentenced to lifetime supervised release. § 3583(k). About one-third of those convicted of possession are in fact sentenced to lifetime supervised release.[7] As a result, they remain

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[6] The maximum term of imprisonment for bank robbery under 18 U.S.C. § 2113(a) is twenty years, which makes it a Class C felony, § 3559(a)(3), which in turn sets the maximum sentence for a violation of supervised release as two years, § 3583(e)(3).

[7] Sentencing Commission Report, *supra* n. 5, at 276, showing that 30% of those convicted under the possession section receive lifetime supervision, as do 42% of those convicted under the distribution and receipt sections that effectively reach the same conduct.

in jeopardy their entire lives to a sentence of life in prison imposed by a judge, acting without a jury, who need not be persuaded beyond reasonable doubt of the new offense for which the sentence would be imposed.

The Government suggests that Mr. Haymond's Fifth and Sixth Amendment rights may be compromised because of a Congressional judgment that most "sex offenders" suffer from "deep-seated aberrant sexual disorders", which cause "frightening and high" re-offense rates. *See* Petitioner's Brief ("Pet. Br.") 6, 54 (quoting *Smith v. Doe*, 538 U.S. 84, 103 (2003)). Even were these factual claims true, they could not possibly explain why any individual could be punished for having committed a second offense without the right to require the government to prove, beyond a reasonable doubt, that he in fact had committed it. The Government's argument is simply a logical non-sequitur. But it is nonetheless cause for concern.

As explained below, nearly two decades ago in *McKune v. Lyle* and *Smith v. Doe*, the Court took "facts" from an amicus brief filed by the Solicitor General that were not in the record, had never been subject to an adversarial hearing, and never published in any peer-reviewed scientific journal, to defend from Constitutional attack other provisions also targeting sexual offenders. In the succeeding decades both courts and legislators have often accorded these "facts" essentially binding effect, because this Court had stated them. *See, e.g., Vasquez v. Foxx*, 895 F.3d 515, 525 (7th Cir. 2018), *cert. denied January 7, 2019*, (quoting *Smith* to explain why the high risk posed by sexual offenders is "self-evident"). The Government's

brief in this case, yet another example, is essentially self-referencing.

The phenomenon is troubling because, as we explain below, the broad scientific consensus is that these often repeated "facts" are seriously mistaken and would not survive adversarial testing. *See Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016) ("The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'"), *cert. denied*, 138 S. Ct. 55 (2017). The Court should use this case as an occasion to discourage litigants from advancing these and other unsupported, extra-record claims, and in particular, to make clear that the discredited factual assertions that the Government cites enjoy no special status because they once made their way into the U.S. reports. Whatever else the Court says or does in this case, we urge that it not give the Government's offhand empirical assertions any credence. It should instead discourage such arguments.

ARGUMENT

I. Overview of Supervised Release Rules Generally, and for Sexual Offenses

A term of supervised release ("supervision") may be included, at the court's discretion, with any sentence of imprisonment. § 3583(a). In exercising that discretion, the court is directed to consider several factors, including special deterrence and the need to provide the defendant with needed training or medical care. § 3583(c). Punishment, a factor courts consider in

setting terms of imprisonment, is omitted from the statutory factors relevant to supervision.[8]

A court that finds that the defendant violated a supervision condition may revoke it and "require the defendant to serve in prison all or part of the term of supervised release authorized by statute" for the original offense (without credit for time already served under post-release supervision). § 3583(e)(3). As explained above, the maximum term of such reimprisonment ordinarily varies from one to five years, according to the severity of the crime for which the defendant has been convicted. § 3583(b). But sexual offenders are generally excepted from this framework because of two separate statutory enactments – the PROTECT Act of 2003[9] and the Adam Walsh Act of 2006[10]–whose provisions relevant to the issue here are codified at § 3583(k).

The first sentence of § 3583(k) establishes, for a wide range of sexual offenses, a minimum supervision term of five years, and a maximum of life, rather than the minimum of zero and maximum of one to five years that applies to other federal felonies. The sexual offenses covered by this sentence include serious Class A and B felonies, such as sex trafficking of children (§ 1591), as well as Class C felonies such as possession of child pornography (§§ 2252 and 2252A).

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[8] The § 3553(a)(2)(A) factor, "just punishment for the offence" is omitted from those otherwise cross-referenced by § 3583(c).

[9] 117 Stat. 650, P.L. 108-21 (2003).

[10] 120 Stat. 590, P.L. 109-248 (2006).

The second sentence of § 3583(k) applies to anyone required to register under SORNA, the Sex Offender Registration and Notification Act (34 U.S.C. § 20911 *et seq.*). This list overlaps but is not identical with the offenses covered by the first sentence.[11] By virtue of the first sentence of § 3583(k), most of these individuals are subject to longer terms of supervised release than other federal offenders. By virtue of the second sentence of § 3583(k), they are subject to enhanced penalties for violations of supervised release whenever the conduct constituting the violation constitutes an offense that is on yet a third list, also set out in this sentence, which again overlaps, but is not identical to, either of the first two.

SORNA registrants covered by the second sentence who commit an offense on this third list, while under supervision, thereby commit a supervision violation subject to a different sentencing range than that which § 3583(b) sets for most other federal offenders. The sentencing range under § 3583(k) for a supervision violation is imprisonment for a term of five years to

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[11] SORNA also applies to state offenders who fail to register after traveling interstate, § 2250(a), so the group "required to register" could be larger than the group identified in the first sentence, who are only federal offenders. But it is unclear whether the second sentence is meant to apply to such state offenders. That sentence addresses the revocation of federal supervised release, and the context suggests they must be on federal supervised release for a federal sexual offense. We make no attempt here to provide a comprehensive parsing of the statute's unnecessarily complex description of the offenders to whom it applies. Suffice to say that Mr. Haymond and others like him are covered by the second sentence.

life, not the zero to five-year range that is otherwise applied.[12]

As the Tenth Circuit correctly recognized, this scheme inevitably produces serious sentencing anomalies that violate *Johnson's* requirement that post-revocation penalties must be "part of the penalty for the initial offense," 529 U.S. 694, 700 (2000), rather than "punishment for defendants' new offenses for violating the conditions of their supervised release." *Id.* Its application to Mr. Haymond's possession offense is an excellent example. The statutory sentencing range for a possession offense is zero to ten years. § 2252(b)(4). But under § 3583(k), he must serve an additional term of at least five years, even if he had already served the ten-year maximum, and is put in jeopardy of a life sentence for the violation, despite the ten-year maximum for the offense. Even a second possession offense carries maximum sentence of twenty years. § 2252(b)(2). We agree with the Tenth Circuit that § 3583(k) "effectively transforms the revocation proceeding into a criminal prosecution, imposing punishment for new conduct." *Haymond*, 869 F.3d at 1166. In fact, it effectively creates an alternate route

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[12] The last sentence of § 3583(k) sets their minimum term for the violation at five years. The maximum term is life because, for any registrant who is on supervised release for a crime that is on the first list in § 3583(k), the first sentence of the section establishes a maximum supervised release term of life, and under § 3583(e)(3), the maximum term of imprisonment for a violation equals the maximum term of supervised release that could have been imposed for that offense. Although§ 3583(e)(3) ordinarily caps that maximum (by reference to the seriousness of the crime of conviction, as explained above), § 3583(k) removes those caps for these violations.

for criminal prosecution for a second offense that eliminates the right to a jury and the requirement of proof beyond a reasonable doubt, while authorizing a far harsher sentencing range.

The Government explains § 3583(k) as grounded on a Congressional "judgment that a particular minimum term of re-imprisonment is necessary for a sex offender like respondent who commits a further sex offense while on supervised release." *See* Pet. Br. 51. That explanation, of course, assumes Respondent has re-offended while on supervised release, when the issue in this case is the evidentiary standard by which to judge the claim that he has. The Congressional power to set a minimum sentence of five years upon a second conviction for possession is not in dispute. The question instead is whether that sentence can be imposed even if the government is unable to prove the second offense beyond a reasonable doubt.

The Government argues that the special rules set out in § 3583(k) are needed because the offenders to whom they apply have "deep-seated aberrant sexual disorders" that result in high re-offense rates.[13] *See* Pet. Brief at 6. We examine the history and accuracy of these factual assertions below. But even if they were true, it is not clear why they would be relevant to the issue in this case. No one would suggest, for example, that because men in their 20's are more likely to re-offend than are older men, the state should be able to

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[13] The Government cites H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 49-50 (2003) for the claim that most sexual offenders have "deep-seated aberrant sexual disorders." While the report makes this assertion, it offers no basis for it.

establish a 22-year old's second offense by a preponderance of the evidence, deny him the right to a jury, and subject him to an enhanced sentencing range, even if none of these provisions would meet Constitutional requirements if he were over forty. This case is no different.

The companion claims that "sex offenders" re-offend at high rates, and that most have deep-seated psychological defects, may reinforce one another in the lay mind. Psychological defects plausibly explain high re-offense rates, and high rates seem to confirm the offenders' defects. Each claim thus feeds the common public intuition that the other is true. These claims also enlist the emotions. People with deep-seated aberrant sexual disorders that compel criminal behavior are indeed frightening, and that fear demands we do something about – or to – such people.

Whether such fears could justify compromising Fifth and Sixth Amendment rights is hardly clear, but surely *baseless* fears cannot. Factual assertions offered to justify the compromising of constitutional liberties require more than casual observation to support them. Unfortunately, as we explain in the next section, the Court has not always required more, with the unfortunate result that its own earlier statements are offered back to it, and other courts, as authority for empirical propositions inconsistent with the scientific evidence.

II. *Smith v. Doe*'s Influential But Misleading Description of Sexual Offender Re-Offense Rates as "Frightening and High" Was Based on a Flawed Reference. The Court Should Decline the Government's Invitation to Repeat It.

Smith v. Doe's dramatic description of the "frightening and high" re-offense rates of registrants, relied upon by the Government, *see* Pet. Br. 54, was first employed in the plurality opinion in *McKune v. Lile*, 536 U.S. 24, 34 (2002), before the Court repeated it in *Smith*, 538 U.S. 84, 103 (2003). It soon went viral. By 2015, the phrase "frightening and high" was found in 91 judicial opinions, and briefs in 101 cases, and more recent searches increase the count.[14] Two examples illustrate the impact of the phrase on the law.

The Iowa Supreme Court, while expressing sympathy for the "difficulties" that state's residency restrictions created for the "offender and his family, who lack financial resources," rejected his constitutional challenge to them because "the risk of recidivism posed by sex offenders is 'frightening and high'", as "numerous authorities have acknowledged." *State v. Seering*, 701 N.W.2d 655, 664-65 (Iowa 2005). Despite this reference to "numerous authorities," only *Smith* was cited. A 25-year old Kansas man convicted of consensual intercourse with a fifteen-year old girl

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[14] Ira Ellman & Tara Ellman, "Frightening and High": *The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 497 (2015). A Lexis search on October 4, 2018 found 119 cases with the phrase "frightening and high."

challenged the state's application to him of a law mandating lifetime post-release supervision of all sexual offenders. The Corrections Department psychologist had testified he accepted responsibility for his actions, displayed an "appropriate level of remorse," and was at low risk to re-offend. *State v. Mossman*, 281 P.3d 153, 157, 161 (Kan. 2012). Rejecting the challenge, the Kansas Supreme Court cited *Smith* in explaining that the legislature could reasonably have concerns about the "frightening and high" re-offense rates of "convicted sex offenders." *Id.* at 160.

The statement in *McKune* that *Smith* referenced said that "the recidivism rate of untreated offenders has been estimated to be as high as 80%". *Smith*, 538 U.S. at 103 (citing *McKune*, 536 U.S. at 33). This claim in *McKune* was supported with a citation to a Justice Department "manual",[15] likely brought to the Court's attention by the Solicitor General's amicus brief in *McKune*, which cites the same manual for the same proposition. *See* Brief for the United States as Amicus Curiae at 3 n.2, *McKune v. Lile*, 536 U.S. 24 (2002). The manual, a collection of chapters by diverse authors, did not present the views of the Justice Department. The chapter containing the quoted claim, cited only one source for it - an article in the mass-market magazine *Psychology Today* that itself contained no reference to any data of any kind.[16] The

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[15] U.S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988), *available* at https://www.ncjrs.gov/pdffiles1/Digitization/123683NCJRS.pdf

[16] See Ellman & Ellman, *supra* n. 4 at 497-98 (2015), which uncovered this story.

article described the author's prison counseling program for sexual offenders, and the statement was offered to contrast the re-offense rate of untreated offenders with an equally unsupported claim about the lower rate for those who completed the author's program. The author has since disavowed the statement.[17]

Peer-reviewed studies published since *Smith* have demonstrate its error. See *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016) ("The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in Smith that the 'risk of recidivism posed by sex offenders is 'frightening and high.'"), *cert. denied*, 138 S. Ct. 55 (2017) (internal quotation marks omitted). But it still lives on, e.g., *Vasquez v. Foxx*, 895 F.3d 515, 525 (7th Cir. 2018) (quoting *Smith* to explain why the high risk posed by sexual offenders is "self-evident").

It is worthwhile to reflect on why the error came about. It would obviously have been avoided by more careful attention to the cited authorities. But a casual approach to testing a statement's accuracy is more likely when the statement is consistent with one's intuitions. And for most people, the very label "sex offender" communicates a dangerous individual with uncontrolled compulsions who is likely to do harm.

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[17] Jacob Sullum, *"I'm Appalled," Says Source of Phony Number Used to Justify Harsh Sex Offender Laws*, REASON (Sep. 14, 2017), http://reason.com/blog/2017/09/14/im-appalled-says-source-of-pseudo-statis.

But "sex offender" is a legal classification, not a psychological diagnosis. It includes some who have committed multiple violent attacks, but also others (like Mr. Haymond) who have only a single conviction for an offense that involved *no* contact of *any* kind, physical or communicative, with *any* victim. The assumption that such diverse offenders share common psychological traits and similar re-offense risks is implausible. In this case, as we document below, the intuition is correct. Many included within the "sex offender" label are among the least likely of all felons to re-offend.

A label that recharacterizes a single event in an individual's history into a dangerous personal attribute confuses discussion. We therefore avoid its use in the remainder of this brief and refer instead to those to whom the rules at issue here apply as "registrants."[18]

III. The Failure to Account for the Enormous Differences Among Registrants Explains Much of the Court's Historically Mistaken Understanding of Re-Offense Rates.

The Court's discussions of registrant re-offense rates often misinterpret studies by failing to focus on *whose* re-offense rates the study measures. *Smith* itself provides an example. In upholding the registration requirement at issue in *Smith*, the Court also referenced a professional study:

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[18] The term "registrant" refers to the main thing these individuals do have in common, which is the legal obligation to register under SORNA and related state laws.

> The duration of the reporting requirement is not excessive. Empirical research on child molesters, for instance, has shown that, "[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release," but may occur 'as late as 20 years following release." R. PRENTKY, R. KNIGHT, & A. LEE, U.S. DEPT. OF JUSTICE, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 14 (1997)).

538 U.S. at 104.

This paragraph quotes a summary of the Prentky study's findings. The full account, published the same year in a peer-reviewed professional journal,[19] explains that the "child molester" population the study followed was 115 individuals released from the Massachusetts Treatment Center for Sexually Dangerous Persons, established "for the purpose of evaluating and treating individuals convicted of repetitive and/or aggressive sexual offenses."[20] So the study did not examine the re-offense patterns of a representative sample of those who had sexual contact with minors, much less of all registrants. It instead focused on a small and atypical subgroup incarcerated in a special facility designed for those who present a particularly high re-offense risk. The paper itself cautions against assuming its findings apply to other offender populations.[21]

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[19] Robert A. Prentky, Austin F. S. Lee, Raymond A. Knight & David Cerce, *Recidivism Rates among Child Molesters and Rapists: A Methodological Analysis*, 21 L. & HUM. BEHAV. 635 (1997).

[20] *Id.* at 637-638.

[21] *Id.* at 636.

The Court's more recent opinion in *United States v. Kebodeaux*, 570 U.S. 387 (2013), cited several times by the Government as authority for registrants' high re-offense rates, (Pet. Br. 51, 54), is another example of the same problem. *Kebodeaux* does acknowledge studies that find registrants have low re-offense rates, but adds the paragraph the Government points to:

> There is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals. See Dept. of Justice, Bureau of Justice Statistics, P. Langan, E. Schmitt, & M. Durose, Recidivism of Sex Offenders Released in 1994, p. 1 (Nov. 2003) (reporting that compared to non-sex offenders, released sex offenders were four times more likely to be rearrested for a sex crime, and that within the first three years following release 5.3% of released sex offenders were rearrested for a sex crime).

570 U.S. at 395-96.

Although the 5.3% re-offense figure taken from the Langan Study is of course many times lower than the "frightening and high" 80% rate erroneously relied on in *McKune* and *Smith*, it still overstates the average three-year re-arrest rate across *all* registrants, for a now familiar reason: the study only examined re-offending by adult, male, violent offenders released from state prisons.[22] This subgroup has a higher re-

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[22] DEPT. OF JUST., BUREAU OF JUST. STAT., PATRICK A. LANGAN ET AL., RECIDIVISM OF SEX OFFENDER RELEASED FROM PRISON IN 1994 1, 3, 7 (NOV. 2003) (hereinafter, "Langan Study") (noting that everyone in the study population was male, all men in the study were violent sex offenders, and only a "few" were under age 18).

offense risk than do registrants generally. One reason is that it oversamples repeat offenders, who are disproportionately sentenced to prison (rather than local jails, or probation)[23], and repeat offenders are more likely to re-offend after release than are first-time offenders. That is shown even within the study's own sample. The re-offense rate of first-time offenders released from prison in the Langan Study was about half the rate of those with a prior conviction for some offense (not necessarily a sex offense). Twenty-eight percent of the study population had at least *six* prior arrests, and their re-offense rate was well more than double that of first-time offenders in the study.[24] If one is considering the application of the rule at issue here

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[23] First offenders commit about 95% of sex crimes but were only 71.5% of those in the Langan Study. For proportion of crimes committed by first offenders, *see* Jeffrey C. Sandler et al., *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCHOL., PUB. POL'Y & L. 284 (2008) (finding that 95% of sex-offense arrestees in New York between 1986 and 2006 were first-time sex offenders.); MINN. DEP'T OF CORR., RESIDENTIAL PROXIMITY & SEX OFFENSE RECIDIVISM IN MINNESOTA (April 2007), http://www.csom.org/pubs/mn%20residence%20restrictions_04-07sexoffenderreport-proximity%20mn.pdf (finding that first offenders constituted 97% of the 10,600 individuals convicted of sexual offenses in Minnesota between 1990 and 2002); For proportion of first offenders in Langan Study, *see* Langan Study at 26 tbl.27, 28 tbl.31 (showing that 29% of those in the study had a prior arrest for a sex crime, and 78.5% had prior arrests of any crime).

[24] The re-offense rate of first-time offenders in the study was 3.3%. Langan Study, *supra* n. 22, at 26 tbl.27. The average three-year re-offense rate among the 28% previously arrested at least 6 times (not necessarily for a sex crime) was about 7.25%. *See id.* at 27 (figure derived from table 29).

to individuals like Mr. Haymond, who are on supervised release for their first offense, the re-offense rates of those with an established history of re-offending is not helpful.

But there is a second important lesson from these examples. It is not only that one cannot use re-offense data from statistically distinct subgroups of registrants to make general statements about the entire group (or about other subgroups). The converse is also true: even average re-offense data properly computed across all registrants provides a needlessly inaccurate estimate of the likelihood of re-offense posed by an individual, because one could instead use re-offense data for the particular subgroup in which the individual falls. Average rates computed across all registrants is a crude measure, given their widely varying risk levels. The group's average re-offense rate is no more likely to fit a random registrant than would a pair of pants of the group's average waist and length.

The next section describes how risk varies across subgroups within the registrant population, and how that information is easily used to provide more accurate assessments of the likelihood that any particular person will re-offend.

IV. Widely Used and Inexpensive Actuarial Tests Can Sort Registrants by Risk Level, and Studies Show That Non-Offending Registrants at All Risk Levels Decline in Risk Over Time.

The Static-99R is a non-proprietary tool developed by researchers employed by the Canadian government and is the most widely used tool in the world to assess

the re-offense likelihood of individuals convicted of a sexual offense.[25] A ten-item actuarial scale[26] validated for adult males convicted of a contact sex offense, it is a relatively simple to administer. In California, for example, trained parole officers routinely administer it, and the state commissioned several studies that validated its predictive accuracy for adult males on the California registry.[27]

Re-offense risk is not static. It changes during the years following release from custody. Some re-offend, others do not. The single most well-established finding in criminology is that for every year they do not, the likelihood of a future re-offense declines.[28] Two widely-

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[25] *See* STATIC99, http://www.static99.org/ (last visited Jan. 22, 2019).

[26] The ten items cover demographics, sexual criminal history (e.g., prior sexual offense), and general criminal history (e.g., prior non-sexual violence). *See, e.g.*, Leslie Helmus, David Thornton, R. Karl Hanson & Kelly M. Babchishin, *Improving the Predictive Accuracy of Static-99 and Static-2002 with Older Sex Offenders: Revised Age Weights*, 24 SEXUAL ABUSE: J. RES. & TREATMENT 64, 65 (2012)). Such "structured" risk assessment tools are more accurate than clinical assessments. R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCHOL. ASSESSMENT 1, 6–8 (2009).

[27] R. Karl Hanson, Alyson Lunetta, Amy Phenix, Janet Neeley & Doug Epperson, *The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California*, 1 J. Threat Assessment & Mgmt. 102, 104-05, 108 (2014).

[28] Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009); Megan C. Kurlychek, Shawn D.

cited studies, described below, show that the same is true for those convicted of sex offenses. They also show that this reduction in re-offense risk over time follows predictable trajectories that vary with the risk level as measured at the time of release.

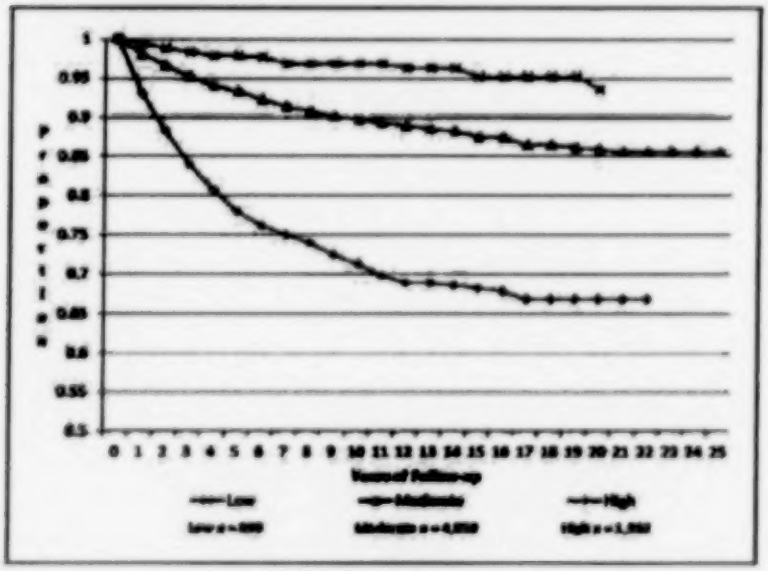

Figure One

Bushway, & Robert Brame, *Long-Term Crime Desistance and Recidivism Patterns–Evidence from the Essex County Convicted Felon Study*, 50 CRIMINOLOGY 71, 75 (2012). Close to half (43%) of American men report being arrested by age 35, but the vast majority never re-offend. J.C. Barnes, Cody Jorgensen, Kevin M. Beaver, Brian B. Boutwell, & John P. Wright, *Arrest Prevalence in a National Sample of Adults*, 40 AMERICAN J. OF CRIMINAL JUSTICE 457 (2015); R. Karl Hanson, *Long-Term Recidivism Studies Show That Desistance Is the Norm*, 45 CRIMINAL JUSTICE AND BEHAVIOR 1340 (2018).

Figure One is taken from the first[29] of the two studies described here. Published in 2014, it combined data from 21 prior studies[30] that in the aggregate followed 7,740 adult male sex offenders after their release from custody. The Static-99R was used to classify offenders as High, Moderate, or Low risk for sexual re-offending at the time of release. Figure One shows the proportion in each of these three risk groups who were still sex-offense free at years 1 to 21 after release.[31]

The Static-99R's predictive power is shown by the separation of the three lines in the years after release. But just as important is how the proportion who are offense-free stabilizes over time. That is, for all three lines there is a point beyond which the line's downward slope becomes very small or ceases altogether. That means there are few, if any, new offenses after that point. Not surprisingly, that point comes sooner for those whose initial risk level was lower. But it

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[29] R. Karl Hanson, Andrew J.R. Harris, Leslie Helmus & David Thornton, *High Risk Sex Offenders May Not Be High Risk Forever*, 29 J. INTERPERSONAL VIOLENCE 2792, 2794–95 (2014). This study examined re-offending by adult men only, because the Static-99R has not been validated for women, juveniles, or some non-contact offenders.

[30] In 10 of the 21 studies, re-offense was defined as a new conviction for a sex offense; in 11, re-offense was defined as the filing of new sex offense charges. *Id.* at 2797.

[31] Sixteen of the 21 studies drawn upon for this analysis followed offender populations in other Western countries (most often, Canada) in which released offenders are not subject to American-style offender registries or residency restrictions. Thus, these American rules could not explain why some do not re-offend.

eventually happens for all risk groups. Even registrants with the highest likelihood of re-offending as of the time of their release become low risk, after enough years at liberty without re-offending.

The second study, published in 2018,[32] directly compares the risk of a new sex offense by registrants with the risk that other felons with no history of sexual offending will commit a sexual offense after their release. This is an appropriate comparison if one is considering special rules for released registrants that are not imposed on other released felons. It is sometimes assumed special rules are appropriate whenever the re-offense risk is above zero, but if that were true then the special rules should apply to every group, an impractical, if not unconstitutional approach. That is because no group in the population, including those with no criminal history, presents a zero sex offense risk.

Any risk reduction program must take account of this fact. The wider the net it casts, the fewer the resources available to apply to each person caught in it, or to other programs that reduce risk. Too wide a net can therefore undermine the purpose animating special rules in the first place. Probably for this reason, states generally do not include nonsexual offenders in their sex offense registry, or subject them to other restrictions often imposed on registrants, such as

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[32] R. Karl Hanson, Elizabeth Letourneau, Andrew J.R. Harris, L. Maaike Helmus & David Thornton, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCHOL. PUB. POL'Y & L. 48, 50 (2018).

residency bans. So, this comparison to the rate of sexual offending by released felons with no prior sexual offense history is consistent with common legislative practice.

After reviewing available data on the rate of post-release sexual offending among those with a criminal conviction, but no conviction for a sexual offense, the researchers concluded that a registrant group with a post-release sexual offense arrest rate of two percent cannot be distinguished from released felons with no sexual offense history.[33] They labeled this 2% rate "desistance".

This second study used Static 99R scores to classify registrants into one of five risk levels as of the time of their release, ranging from "Very Low" through "Well Above Average". Risk levels for all five groups were then recalculated at six-month intervals in the years following release, to take account (when true) of the absence of any sexual reoffending up to that point. These "hazard rates" for each of the five risk categories are shown in Figure Two, reproduced from the 2018

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[33] *Id.*at 49 (discussing the findings of Rachel E. Kahn, Gina Ambroziak, R. Karl Hanson & David Thornton, *Release from the Sex Offender Label*, 46 ARCHIVES SEXUAL BEHAV. 861, 862 (2017)). Almost all the studies surveyed in ***Kahn, et al***, *id*, defined sexual offending after the nonsexual offender's release from prison as a conviction for a sexual offense rather than an arrest. Defining re-offense as a conviction generally yields lower rates than if re-offense is defined as an arrest, in part because available data often has gaps that fail to show whether a conviction followed an arrest. Any comparison of re-offense studies with different definitions of "re-offense" must take this difference into account. A lower rate for studies using conviction as the criterion is equivalent to some higher rate for studies using arrest as the criterion.

study, for the 24 years following release. The horizontal black line shows the 2% "desistance" rate against which each group's hazard rate for any given year can be compared.[34]

Figure Two again illustrates the predictive accuracy of the Static 99R. But more importantly, it shows more

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[34] When arrests for sexual offenses are discussed, the observation is usually made that a significant proportion of sex offenses are not reported. While surely true, that observation has little bearing on this analysis. There is no reason to think police are less likely to know about offenses committed by registrants than those committed by individuals without a sex-offense record. Indeed, if anything, the contrary seems more likely, assuming investigations start by examining individuals on the registry. If unreported offenses were taken in account, therefore, the relative rate of re-offense by registrants-their real rate as compared to the real rate of others-would likely be lower, because offenses they commit are less likely to go undetected than offenses committed by others.

Indeed, increased public attention to the problem of sex offenses seems to have reduced the proportion that go unreported to levels that now approach that for nonsexual crimes. Rachel Morgan and Jennifer Truman, *Criminal Victimization, 2017*, Dept. of Justice, Bureau of Justice Statistics (December 2018, NCJ 252472), https://www.bjs.gov/content/pub/pdf/cv17.pdf, at 7 tbl.6 (showing that the proportion of sexual assaults reported to the police increased significantly in 2017, to 90% of the reporting level for violent crime generally). This trend appears to have begun some years ago, as studies from 2011 show a reduction in the proportion of sexual offenses against child victims that go unreported. Finkelhor, Ormrod, Turner, & Hamby, *School, Police, and Medical Authority Involvement With Children Who Have Experienced Victimization*, 165 ARCHIVE OF PEDIATRIC AND ADOLESCENT MEDICINE 9 (2011)). Police are particularly likely to know about sex offenses committed against children by adults (as opposed to the large share that were committed by other children). *Id.*

clearly how the likelihood of re-offending declines, over time at liberty without a new offense, for every risk group. Even those in the very highest risk group ("well above average") fall below the 2% benchmark eventually, if they do not reoffend. Lifetime classification as a high risk, in other words, is not justified even for everyone initially classified at the highest risk level, because many also become low risk after enough years at liberty without having reoffended.

But in any event, this highest risk group is a very small proportion of all registrants. A recent California study found that only 33 of a random sample of 371 adult male registrants (8.8%) were in this risk category.[35] Another 74 (20%) were above average in risk.[36] More than 70% of registrants were in the three lower risk categories. Note that Figure Two shows that the lowest risk group is at the 2% rate *at the time of their release*.

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[35] Seung Lee, R. Karl Hanson, Nyssa Fullmer, Janet Neeley & Kerry Ramos, *The Predictive Validity of Static-99R Over 10 Years for Sexual Offenders in California: 2018 Update* at 19, http://saratso.org/pdf/Lee_Hanson_Fullmer_Neeley_Ramos_2018_The_Predictive_Validity_of_S_.pdf (last visited Jan. 22, 2018).

[36] *Id.*

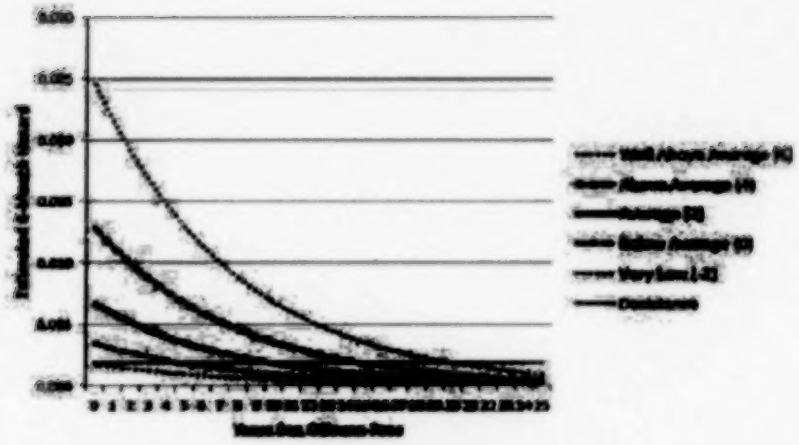

Figure Two

The clear lesson from this data is that general statements about the risk posed by "sex offenders"- or registrants-are not useful. The likelihood of re-offending varies across individuals, and also over time for any particular individual. And these likelihoods can be assessed by a simple actuarial test already in wide use. A legal rule cannot be justified by a high risk of re-offending for ""sex offenders" as a group, because far too many in the group present a low risk, either at release or later. A claim that high re-offense risk justifies a compromise of constitutional rights must surely rest, if accepted at all, on a valid assessment of the risk posed by the individual whose rights one proposes to limit.

This point is especially relevant in this case. As we explain in the next section, the majority of federal offenders potentially affected by § 3583(k) have, like Mr. Haymond, only a single criminal conviction for a

non-production CP offense. They are therefore among those with the lowest re-offense risk.

V. Those Whose Only Criminal Conviction is for Possession of Child Pornography Are A Distinct Group Among Sexual Offenders, And Pose a Particularly Low Re-Offense Risk.

During Fiscal Year 2016, federal courts sentenced a total of 2,580 individuals for sexual offenses of all kinds.[37] Fifty-four percent of these—1,403—were sentenced under § 2G2.2, the guideline covering possession and the related non-production offenses indistinguishable from it.[38] As a practical matter, then, possession is the offense to which § 3583(k) has the greatest potential application. And as authorized by that section's first sentence, a life term of supervised release is imposed on about one-third of these offenders.[39]

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[37] These and subsequent totals were calculated using Table 17 in the United States Sentencing Commission's 2016 Interactive Sourcebook of Federal Sentencing Statistics, https://www.ussc.gov/research/sourcebook-2016 (last visited Jan. 22, 2018). Sexual offenses other than non-production child pornography are the sum of all those sentenced under guidelines § 2A3.1,§ 2A3.2, § 2A3.3, § 2A3.4, § 2G1.1, § 2G1.2,§ 2G1.3, § 2G2.1, § 2G2.3, § 2G2.4, § 2G2.5, § 2G2.6, § 2G3.1, and § 2G3.2.

[38] Receipt and distribution of child pornography are included in this tabulation, as 97% of all non-production offenders necessarily committed those offenses as well, even though half were prosecuted only for possession. See n. 5, *supra*.

[39] See n. 7, *supra*.

Those convicted of possession (but no other sexual offense) are demographically distinct from other registrants. A study by researchers at the Federal Bureau of Prisons compared them to federal offenders convicted of a contact offense but no possession offense. They found that possession offenders were on average older, less likely to have been unemployed, less likely to have any history of substance abuse, and less likely to have a prior criminal offense of any kind. Studies of non-federal offenders echo these findings,[40] and also show that possession offenders are on average more highly educated[41].

There are also clear differences in the psychological traits of known contact-offenders, as compared to possession offenders. Committing violent acts typically requires psychological traits that are not needed to look at depictions of them. One study found, for example, that more than ten percent of a sample of male college

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[40] *E.g.* Babchishin, K. M., Hanson, R. K., & Hermann, C. A., *The Characteristics of Online Sex Offenders: A Meta-Analysis*, 23 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 92 (2011) (older, white, fewer prior crimes); Blanchard, R., Kolla, N. J., Cantor, J. M., Klassen, P. E., Dickey, R., Kuban, M. E., & Blak, T., *IQ, Handedness, and Pedophilia In Adult Male Patients Stratified By Referral Source*, 19 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 285 (2007); Elliott, I. A., Beech, A. R., Mandeville-Norden, R., & Hayes, E., *Psychological Profiles of Internet Sexual Offenders: Comparisons With Contact Sexual Offenders*, 21 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 76 (2009) (older).

[41] Blanchard, R., Kolla, N. J., Cantor, J. M., Klassen, P. E., Dickey, R., Kuban, M. E., & Blak, T., *IQ, Handedness, and Pedophilia In Adult Male Patients Stratified By Referral Source*, 19 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 285 (2007).

undergraduates had sexual fantasies involving children, but that "pornography use was associated with deviant sexual behavior scores only for individuals scoring high in psychopathy."[42] People who never commit a crime may nonetheless fantasize about causing someone harm. Millions of Americans routinely enjoy movies that depict interpersonal violence but never commit violent acts themselves.

A capacity for victim empathy creates a psychological barrier against committing violent acts that harm others. Those who in fact commit such acts are more likely to lack that capacity. They are also more likely to have an antisocial personality.[43] Studies find that just these differences distinguish possession offenders from those who commit contact offenses against children.[44] Other studies show that as

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[42] Kevin M. Williams, et al., *Inferring Sexually Deviant Behavior from Corresponding Fantasies: The Role of Personality and Pornography Consumption*, 36 CRIM. JUST. & BEHAVIOR 198, 212 (2009). ("The cardinal features of psychopathy include a deceptive and manipulative interpersonal style, shallow affect (e.g., lack of guilt and empathy), and an impulsive, irresponsible, and antisocial lifestyle." *Id.* at p. 206.)

[43] Antisociality refers to a set of personality traits and attitudes indicating disregard for societal norms and the safety of others, a lack of remorse, impulsivity, and persistent rule breaking. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th Ed. 2013).

[44] Babchishin, et al., *Online Child Pornography Offenders are Different: A Meta-analysis of the Characteristics of Online and Offeine Sex Offenders Against Children* 44 ARCHIVES OF SEXUAL BEHAVIOR 45, 51 (2015).

compared to possession offenders, contact offenders demonstrate lower capacity for self-control in general.[45]

These demographic and psychological differences help explain why individuals with a single possession conviction (like Mr. Haymond) have low rates of re-offending and are particularly unlikely to commit a contact offense after release. A study by the United States Sentencing Commission looked at the post-release conduct of every one of the 610 individuals released from federal custody in 1999 and 2000 who (1) was convicted of possession, receipt, or distribution of child pornography and (2) had no convictions for any other sex offense (although 92 had prior non-sexual offenses).[46] The study followed these individuals for an average of 8.5 years after their release from custody. All but 22 of the 610 (96.4%) remained free of a contact sex offense of any kind.[47] Fourteen looked at pictures again.[48] The overwhelming majority did neither.

A study by a team that included both the leading scholar of internet sexual offending, and the primary developer of the Static 99R, found that just 25 of 1,247 online child pornography offenders committed a contact sexual offense after release. They concluded that "online offenders rarely go on to commit detected

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[45] Elliott, et al., *The Psychological Profiles of Internet, Contact, and Mixed Internet / Contact Sex Offenders* 25 SEXUAL ABUSE: J. OF RES. & TREATMENT 3, 10 (2012).

[46] Sentencing Commission Report, supra n. 5, at 295-96.

[47] *Id.* at 300.

[48] *Id.*

contact sexual offenses."[49] These results are repeated in study after study in American, as well as in foreign, populations.[50] A 2014 study of federal possession offenders by researchers at the Federal Bureau of Prisons concluded that efforts to reduce their re-offense rates with therapy may not be cost-effective, because the "overall re-offense base rate of CP offenders" was so low it was difficult to reduce it further.[51] A leading authority on internet sexual offending, who has an ongoing research program to devise a tool to predict reoffending in this group, explained in submissions to the U.S. Sentencing Commission that first-time possession offenders with no other criminal conviction have a particularly low risk of sexual recidivism.[52]

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[49] Michael C. Seto, R. Karl Hanson, and Kelly M. Babchishin, *Contact Sexual Offending by Men With Online Sexual Offenses*, 23 Sexual Abuse: A Journal of Research and Treatment 124, 136 (2011).

[50] Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeursfrom Pederasts* 61 HASTINGS L.J. 1281, 1294-97 (2010) (collecting additional studies); *see also* Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 BMC PSYCHIATRY, July 14, 2009, http://www.biomedcentral.com/content/pdf/1471-244X-9-43.pdf (Study of Swiss offenders concludes that "the consumption of child pornography alone does not seem to represent a risk factor for committing hands-on sex offenses.").

[51] Faust, et al., *Child Pornography Possessors and Child Contact Sex Offenders: A Multilevel Comparison of Demographic Characteristics and Rates of Recidivism* 27 SEXUAL ABUSE: J. RES. & TREATMENT 1, 15 (2014).

[52] Michael Seto, *Child Pornography Offender Characteristics and Risk to Reoffend* (Feb. 6, 2012) (Submission prepared in connection

The Government's claim that a heightened propensity to re-offend justifies the provisions at issue here is problematic as a general matter, for all the reasons set forth in prior sections. But it is particularly troublesome with respect to possession offenders, who constitute a majority of those affected by this claim.

CONCLUSION

The Government urges the Court to reverse the Tenth Circuit, relying in part on prior statements by this Court concerning the propensity of "sex offenders" to repeat their crimes as justification for that result. But these statements were made without the benefit of any serious examination of the scientific evidence bearing on their accuracy. Such an examination would create serious doubts about their accuracy, as it did for the Sixth Circuit in *Does #1-5 v. Snyder*. 834 F.3d 696 (6th Cir. 2016).

The Court should resist the Government's urging that it repeat the mistake in this case. To the contrary, the Court should use the opportunity this case presents to make clear that its earlier statements cannot be taken as resolving this factual claim, and that indeed, there is serious reason to doubt the factual accuracy of the Court's earlier statements. They therefore cannot serve as the basis for upholding the constitutionality of the supervised release sentencing provisions here at issue.

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with testimony before the United States Sentencing Commission), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215-16/Testimony_15_Seto.pdf.

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APPENDIX

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APPENDIX

DESCRIPTION OF *AMICI CURIAE*

Amanda Agan is Assistant Professor of Economics and an Affiliated Professor in the Program in Criminal Justice at Rutgers University. She received her Ph.D. in Economics from the University of Chicago. Her research focuses on the economics of crime, and her studies spotlight the unintended consequences of policies such as sex offender registration and ban-the-box laws. Her studies on the consequences of sex offender registration include papers in the *Journal of Law and Economics* and the *Journal of Empirical Legal Studies*.

Catherine L. Carpenter is The Honorable Arleigh M. Woods and William T. Woods Professor of Law, Southwestern Law School. She teaches and writes in the area of criminal law. Her primary scholarly focus is about the injustice and unconstitutionality of sex offender registration laws. Her work has been cited by courts, including the Maryland Court of Appeals in *Doe v. Department of Public Safety and Correctional Services*, 62 A.3d 123 (Md. 2013), which overturned Maryland's sex offender registration laws on *ex post facto* grounds.

Ira Ellman is Distinguished Affiliated Scholar, Center for the Study of Law and Society, University of California, Berkeley, and Affiliated Faculty of the Berkeley Center for Child and Youth Policy. He was Chief Reporter for the American Law Institute's major project, *Principles of the Law of Family Dissolution*.

His empirical studies with social psychologists have focused on family policy. His 2015 article, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, has been widely discussed in both legal publications and in key national media.

R. Karl Hanson, Ph.D., C.Psych., is one of the leading researchers in the field of risk assessment and treatment for individuals with a history of sexual offending. He has published more than 175 articles, including several highly influential reviews, and has contributed to the development of the most widely used risk assessment tools for individuals with a history of sexual offending (Static-99R; Static-2002R; STABLE-2007). Based in Ottawa, Canada, he worked for Public Safety Canada between 1991 and 2017, a federal department, and retired as Manager of Corrections Research. He is now adjunct faculty in the psychology departments of Carleton University (Ottawa) and Ryerson University (Toronto).

Eric Janus is a professor of law at Mitchell Hamline School of Law, former President and Dean of William Mitchell College of Law, a scholar and expert in sex offender civil commitment laws, author of *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State*, and director of the Sex Offense Litigation and Policy Resource Center, established in 2017.

Richard A. Leo, Ph.D., J.D., is the Hamill Family Chair Professor of Law and Psychology and Dean's Circle Scholar at the University of San Francisco School of Law. He is an expert on police interrogation practices, the impact of *Miranda*, psychological coercion, false confessions, and the wrongful conviction

of the innocent. Dr. Leo has won numerous individual and career achievement awards for research excellence and distinction, and in 2016, the *Wall Street Journal* named him as one of the twenty-five law professors most cited by appellate courts in the United States.

Chrysanthi Leon, J.D., Ph.D., is Associate Professor of Sociology and Criminal Justice at the University of Delaware. She received her J.D. and Ph.D. from the University of California, Berkeley. She is the author of *Sex Fiends, Perverts, and Pedophiles: Understanding Sex Crime Policy in America*, and co-editor of *Challenging Perspectives on Street-Based Sex Work*.

Jill S. Levenson, Ph.D., is a Professor of Social Work at Barry University in Miami Shores, Florida. She studies the impact and effectiveness of social policies and therapeutic interventions designed to reduce sexual violence. She has published over 100 articles about sex offender management policies and clinical interventions, including projects funded by the National Institutes of Justice and the National Sexual Violence Resource Center.

Wayne A. Logan is Gary & Sallyn Pajcic Professor, Florida State University College of Law. Professor Logan is the author of *Knowledge as Power: Criminal Registration and Community Notification Laws in America* (Stanford University Press, 2009), cited by the U.S. Supreme Court in *United States v. Kebodeaux*, 570 U.S. 387 (2013), and co-editor (with J.J. Prescott) of *Sex Offender Registration and Community Notification Laws: An Empirical Evaluation* (Cambridge Univ. Press, under contract).

Robert D. Lytle is an Assistant Professor in the Department of Criminal Justice at the University of Arkansas at Little Rock. He has published research on public opinion, desistance patterns, and policy relating to sex offending, including a dissertation and several papers on sex offender registration and notification laws. His current work is focusing on policy implementation and effectiveness for criminal justice policy, including sex offense laws generally and sex offender registration and notification specifically.

Michael H. Miner, Ph.D., L.P., is Professor of Family Medicine and Community Health and Research Director for the Program in Human Sexuality at the University of Minnesota Medical School. He is Coordinator of Psychological and Forensic Assessment for the Program in Human Sexuality. His research focuses on sex offender treatment, sexual abuse perpetration by adolescent males, risk assessment, and psychological and cognitive mechanisms underlying hypersexuality and sexual risk behavior. He is the immediate Past President of the Association for the Treatment of Sexual Abusers and Past Vice President of the International Association for the Treatment of Sexual Offenders.

John Monahan is the Shannon Distinguished Professor of Law and Professor of Psychology and Psychiatry at the University of Virginia. He is a member of the National Academy of Medicine and of the American Academy of Arts and Sciences. Monahan is the founding president of the American Psychological Association's Division of Psychology and Law. He is the author or editor of 17 books and more than 300 articles and chapters. Monahan's work has been cited

frequently by courts, including the California Supreme Court in the landmark case of *Tarasoff v. Regents*, and the United States Supreme Court in *Barefoot v. Estelle*, in which he was referred to as "the leading thinker on the issue" of violence risk assessment.

J.J. Prescott, Ph.D., J.D., is an economist and Professor of Law at the University of Michigan where he is co-director of the Empirical Legal Studies Center and the Program in Law and Economics. His recent research includes examination of the ramifications of post-release sex offender laws and the socio-economic consequences of criminal record expungement. The Sixth Circuit Court of Appeals relied upon his work in *Does #1–5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017) in holding that portions of Michigan's sex offender registration law violated the *Ex Post Facto* clause.

Lisa L. Sample is the Reynolds Professor of Public Affairs and Community Service in the School of Criminology and Criminal Justice at the University of Nebraska Omaha. She has been publishing research on public opinion, reoffending, and sex offender laws since 2001. Her current research focus is the longitudinal effects of sex offender laws on registrants, their partners/spouses, and their children, which is the subject of her forthcoming co-authored book, *Living Under Sex Offense Laws: Consequences for Offenders and their Families*.

Michael Seto, Ph.D., is the forensic research director of the Royal Ottawa Health Care Group. A clinical and forensic psychologist, he has presented and published extensively on the topics of pedophilia, sexual offending, online offending, and risk

assessment. He is internationally recognized for this work and has authored two well-reviewed books on these topics published by the American Psychological Association, including his 2013 volume, Internet Sex Offenders.

Kelly Socia, Ph.D., is an Associate Professor in the School of Criminology and Justice Studies at the University of Massachusetts Lowell. His research has focused on individuals listed on sex offense registries, residency restrictions, re-entry and recidivism, among other topics. In a recent Florida case he provided expert testimony and geomapping that resulted in a ruling against *ex post facto* application of local residency restrictions.

Richard Wollert, Ph.D., is a member of the Mental Health, Law, and Policy Institute at Simon Fraser University. An expert witness in many cases involving sexually violent predators, his publications critique sex offender recidivism risk assessments, DSM paraphilia diagnoses, and federal sentencing guidelines for child pornography. Dr. Wollert and his associates have treated over 5,000 sex offenders at his Oregon and Canadian clinics.

Franklin Zimring is the William G. Simon Professor of Law and Faculty Director, Criminal Justice Studies, at the University of California, Berkeley. He is known worldwide for his empirical work on criminal justice policy. Among his many books are *Criminal Law and the Regulation of Vice* and *An American Travesty: Legal Responses to Adolescent Sexual Offending*.

No. 17-1672

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ANDRE RALPH HAYMOND,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* STATES OF UTAH, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, HAWAII, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MONTANA, NEBRASKA, NEW JERSEY, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, WEST VIRGINIA, AND WYOMING SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*

The States house the vast majority of inmates in the country, most of whom will eventually be paroled.[1] The States also oversee the vast majority of offenders on some form of supervised release.[2] Because federal supervised release is "analogous" to State probation and parole, *Johnson v. United States*, 529 U.S. 694, 710-11 (2000), any strictures this Court places on federal revocation proceedings might later be read to constrain the States, too.

The States, however, have strong interests in preserving their "authority . . . over the administration of their criminal justice systems"—a power that "lies at the core of their sovereign status." *Oregon v. Ice*, 555 U.S. 160, 170 (2009). Those criminal justice systems include "varying types of proceedings," ranging from

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[1] *See* Bureau of Justice Statistics, *Reentry trends in the U.S.*, https://www.bjs.gov/content/reentry/releases.cfm#number (last visited Dec. 12, 2018) (as of early 2000s, 95% of State prisoners eventually released, nearly 80% paroled); *see also* Edward E. Rhine, Joan Petersilia, & Kevin R. Reitz, *The Future of Parole Release*, 46 Crime & Just. 279, 281 (2017) (explaining that most inmates are released on parole).

[2] As of 2016, States housed an estimated 6,262,000 inmates and supervised an estimated 4,518,100 probationers and parolees, compared to the Federal government's 320,000 inmates and 132,800 supervisees. Bureau of Justice Statistics, *Correctional Populations in the United States, 2016*, data tables, https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6226 and *Probation and Parole in the United States, 2016*, data tables, https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6188 (last visited Dec. 12, 2018). Using these numbers, the States house 95% of inmates and supervise 97% of persons on supervised release.

"criminal trials" to "probation or parole revocation hearings." *Gagnon v. Scarpelli*, 411 U.S. 778, 788-89 (1973). And "there are critical differences between" those varying proceedings that "both society and the probationer or parolee have stakes in preserving." *Id.* at 789.

Honoring those distinctions ensures that States retain flexibility when exercising their sovereign right to experiment with different approaches to supervision. That should produce more successful models to "prevent[] and deal[] with crime"—enterprises "much more the business of the States than . . . of the Federal government." *Patterson v. New York*, 432 U.S. 197, 201-02 (1977).

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with the United States that the Tenth Circuit erroneously extended the jury trial right to post-sentencing proceedings, and that this Court should reverse. History, State sovereignty, and administrability concerns all counsel against extending the jury right to post-sentencing proceedings.

However this Court reaches that result, it should make clear that as long as the penalties at a revocation proceeding remain within the bounds of the jury verdict or plea, the States remain free to experiment with different approaches to supervision as they seek better ways to rehabilitate offenders while protecting the public. Since every State has probation and nearly every State has parole—both of which are analogous to supervised release—a contrary ruling could portend

significant consequences for every State's criminal justice system.

ARGUMENT

I. THIS COURT SHOULD NOT EXTEND THE JURY TRIAL RIGHT TO REVOCATION PROCEEDINGS.

The Tenth Circuit erroneously held that Congress violated the Sixth and Fifth Amendments by imposing a statutory term of reimprisonment for persons who commit new crimes while on supervised release. *Amici* agree with the United States that this Court should reverse. In doing so, the Court should emphasize that unless a post-sentencing proceeding imposes penalties exceeding the bounds of a plea or verdict, the States remain free to innovate in sentencing and revocation proceedings.

A. By design, offenders have fewer procedural protections after the criminal prosecution ends.

The Sixth Amendment protects an array of rights for "the accused" in "criminal prosecutions," including the right to an impartial jury. U.S. Const. amend. VI. The Fifth and Fourteenth Amendments' Due Process Clauses supplement this right with a requirement that the government establish guilt beyond a reasonable doubt, whether by trial or plea. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (citing cases); *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (applying *Apprendi* to guilty pleas). Unless a defendant pleads guilty or waives a jury, jury findings beyond a reasonable doubt are required on all elements of an offense—that is, on facts that raise the maximum or minimum penalties. *Apprendi*, 530 U.S. at 490

(maximum incarceration); *Ring v. Arizona*, 536 U.S. 584, 592-93 (2002) (death eligibility); *Southern Union Co. v. United States*, 567 U.S. 343, 348-50 (2012) (maximum fines); *Alleyne v. United States*, 570 U.S. 99, 113 (2013) (minimum incarceration).

At sentencing, judges[3] have discretion to impose penalties within the bounds the judgment sets. The Court has "often noted that judges in this country have long exercised discretion . . . in imposing sentence *within the limits* in the individual case." *Apprendi*, 530 U.S. at 481; *see also Alleyne*, 570 U.S. at 116 (similar); *Ice*, 555 U.S. at 171 (holding judges have discretion to decide whether to run sentences consecutively or concurrently free of Sixth Amendment strictures).

In exercising that discretion, judges may find facts at a standard less than beyond a reasonable doubt and consider all manner of evidence that would not be admissible at trial. "[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment," even when a judge is "influenced by [any] matter shown in aggravation or mitigation." *Alleyne*, 570 U.S. at 116-17 (cleaned up). "For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *United States v. Booker*, 543 U.S. 220, 233 (2005); *see also Dillon v. United States*, 560 U.S.

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[3] A few states—Kentucky, Missouri, Oklahoma, and Texas—use sentencing juries as a general rule. *See* Arthur W. Campbell, *Law of Sentencing*, § 9:11 (Westlaw 2018) (citing statutes). Other states limit jury sentencing to capital cases. *Id.*; *see, e.g.*, Utah Code Ann. § 76-3-207.

817, 828-29 (2010) (holding that exercise of sentencing discretion does not violate Sixth Amendment); *Williams v. New York*, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts . . . practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.").

Criminal sentences almost invariably include either an incarceration term or supervision in lieu of all or part of that term. Supervision may occur either up front (probation) or after serving some portion of a prison term (parole and supervised release), but always includes conditions. *See generally* 21A Am. Jur. 2d Criminal Law § 817, *Probation, generally; parole and suspension of sentence distinguished* (describing probation and parole). Common conditions include not committing further crimes, cooperating with a supervising officer, paying fines and restitution, and not using drugs or alcohol. *See, e.g.*, 18 U.S.C. § 3563 (federal probation conditions); Roger K. Warren, National Center for State Courts, *A Brief Memo on Probation Conditions*, https://bit.ly/2DnK85I (last visited Dec. 12, 2018) (listing common State probation conditions).

If a supervisee violates his conditional release, due process entitles him to notice of the allegations and evidence against him, a neutral decisionmaker, the right to be heard and to participate at a hearing, and a written decision. *Morrisey v. Brewer*, 408 U.S. 471, 489 (1972). In limited circumstances, he may also have a

due process right to counsel. *See Gagnon*, 411 U.S. at 790.

But "the full panoply of rights due a defendant" in a criminal trial does not apply in proceedings after conviction and sentencing for several reasons. *Morrisey*, 408 U.S. at 480. First, consider the Sixth Amendment's plain terms: After an offender is convicted, he is no longer "the accused." U.S. Const. amend. VI. And after he is sentenced, the proceeding is no longer a "criminal prosecution." *Id.* That's because the "imposition of sentence" marks "the end of the criminal prosecution." *Morrisey*, 408 U.S. at 480; *see also Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984) (same) *Gagnon*, 411 U.S. at 781 (same); *cf. Betterman v. Montana*, 136 S. Ct. 1609, 1613 (2016) (dividing criminal proceedings into three phases: charge, conviction, and sentencing).[4]

Second, release/revocation proceedings occur long after the State has met its heavy burden under the Fifth and Fourteenth Amendments to prove guilt beyond a reasonable doubt. Parolees long ago lost "the presumption of innocence," and their post-conviction

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[4] Though sanctions for violations of release terms are "part of the penalty for the initial offense," *Johnson*, 529 U.S. at 700, the proceedings are not part of the criminal prosecution. *See United States v. Carlton*, 442 F.3d 802, 807 (2d Cir. 2006) ("Because revocation proceedings generally have not been considered criminal prosecutions, they have not been subject to the procedural safeguards"); *cf. Gagnon*, 411 U.S. at 789 (distinguishing revocation proceedings from criminal trials). Even if the alleged violations are new criminal offenses that can be separately charged, they are not (in this setting) crimes, but only factors to determine whether to alter or revoke conditional release.

procedural safeguards "are not co-extensive with those enjoyed by a suspect" who has not yet been convicted. *United States v. Carlton*, 442 F.3d 802, 809 (2d Cir. 2006). Because the offender has already received "due process of law," the government may now execute his sentence—deprive him of "life, liberty, or property"—according to his crime (and consistent with the limited due process protections attendant to revocation proceedings).

Third, when an offender is on probation, parole, or supervised release, his liberty is conditional. "[T]hose who are allowed to leave prison early are subjected to specified conditions for the duration of their terms." *Morrisey*, 408 U.S. at 478. When an offender faces revocation of that release, he is deprived "not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special [] restrictions." *Id.* at 480; *United States v. Knights*, 534 U.S. 112, 119 (2001) (similar); *see also Carlton*, 442 F.3d at 810 (relying on conditional liberty interest to reject Sixth Amendment procedures at revocation hearings).

Release conditions can "restrict [an offender's] activities substantially beyond the ordinary restrictions imposed by law on an individual citizen." *Morrisey*, 408 U.S. at 478. This includes limiting constitutional rights, like the First Amendment right of association, 16A Am. Jur. 2d Constitutional Law § 593, *Probation and parole* (release conditions may include limits on who the supervisee may contact); the Fourth Amendment right against unreasonable search and seizure, *see Samson v. California*, 547 U.S. 843, 853 (2006) (holding governmental interests in supervising

convicts and protecting public "warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment"); the Fifth Amendment right against self-incrimination, *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984) (holding Fifth Amendment privilege not self-executing as to probationers); and the Eighth Amendment right to bail, 8A Am. Jur. 2d Bail and Recognizance § 27, *Probation or parole violators* (citing cases for probation violators not being entitled to bail).

B. Probation and parole revocation have never involved juries, and should not do so now.

The Tenth Circuit held that 18 U.S.C. § 3583(k) violates the Fifth and Sixth Amendments under *Apprendi* and its progeny because "(1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range," and "(2) it imposes heightened punishment . . . based, not on [the] original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt, and for which they may be separately charged, convicted, and punished." Pet. App. 15a.

Amici agree with the United States that this Court should reverse. Whatever reasoning the Court adopts to do so, however, should not place the constitutional "straitjacket[]" of a post-conviction sanctions jury on State criminal justice systems. *Ice*, 555 U.S. at 171. To be sure, *amici* do not quarrel with the suggestion that the States and the Federal government retain sovereign discretion to convene sanctions juries by legislative mandate. But if the Court were to hold that

the Constitution requires the Federal government to empanel a sanctions jury before revoking supervised release—and later that holding were extended to a State's revoking probation or parole—it could hamper State efforts to innovate in probation and parole sanctions.

In deciding whether "impelling reason[s]" exist to "straightjacket[]" State criminal justice systems with procedures such as sanctions juries, the Court considers (1) historical practice, (2) respect for State sovereignty, and (3) administrability. *Id.* at 168, 171. All three counsel against extending the jury trial right to revocation proceedings.

1. History debunks the notion that juries play any role in revocation proceedings. *Apprendi* held that the Constitution requires jury findings on each element of an offense because that was a "longstanding common-law practice." *Ice*, 555 U.S. at 167. Preserving "the jury's historic role as a bulwark between the State and the accused *at the trial* for an alleged offense" was the "animating principle" behind the Sixth Amendment jury right. *Id.* at 168 (emphasis added). And as shown, judges—not juries—have traditionally exercised broad discretionary power at sentencing.

By contrast, conditional release as currently practiced post-dates adoption of the Fifth and Sixth

Amendments.[5] To the extent that parole (and later probation) became common-law practices after the adoption of the Bill of Rights, they have been a matter of executive and judicial clemency, with some legislative participation.

Parole was born in the mid-1800s in Norfolk Island, Australia. Beth Schwartzapfel, "Parole Boards: Problems and Promise," *Federal Sentencing Reporter*, vol. 28 no. 2, 80 (Dec. 2015). Warden Alexander Manconochie broke from the tradition of "discipline by brute force" and sought instead to make convicts into "gentlemen." *Id.* A prisoner's behavior earned or lost him "marks"; with enough good behavior, he could earn sufficient marks to buy his freedom. *Id.* This rehabilitative model started to overtake the retributive model in several European countries, and came to the United States in the late nineteenth and early twentieth centuries. *Id.* "By 1927, almost every U.S. state had [such] a [] system in place," with parole

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[5] Clemency existed, but was not exercised by juries. *See* Note, James N. Jorgensen, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. Rich. L. Rev. 345, 348-52 (Winter 1993) (discussing history of pardon power). At common law in Great Britain, pardons had been granted at various times by Parliament, the crown, the church, the nobility, and the feudal courts. *Id.* at 350 & n.35. In the United States, the Framers vested the pardon power exclusively with the President. *See* U.S. Const. art. II, § 2.

What power juries did have to grant relief appears to have been limited to the verdict itself via nullification. *See generally* William H. Blackstone 3 Commentaries on the Laws of England, 238-29 (W.L. Dean 1846) (discussing "pious perjury" of jury acquittals despite strong evidence of guilt). By its nature, this cannot be exercised post-verdict.

boards assessing a convict's readiness to re-enter society. *Id.*[6]

Legislatures have entrusted probation decisions to the judiciary, with no role for the jury. Some see the common law roots of probation in the "benefit of clergy," whereby men of the cloth charged with capital felonies were transferred from the King's Court to an ecclesiastical court. *See* Rollin N. Perkins & Ronald N. Boyce, *Criminal Law*, 2-3 (3d ed. 1982). Others see them in the efforts of men such as John Augustus, a Boston cobbler who "altruistically took it upon himself to intervene on behalf of 'common drunkards' and petty criminals" by posting bond for them, getting them released from prison, and helping them reform. Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 Buff. Crim. L. Rev. 171, 174-75 (2003). Whatever probation's origins, it began formally in the United States when Massachusetts passed the first probation statute in 1878. *Id.* at 175. The idea eventually spread—by the early 1900s, most States gave judges authority to grant and supervise probation, and by the 1950s, that practice was universal. *Id.* at 175-78 & n.19. But whether the practice started in 1590 or 1950, the process has never involved jurors.

2. Respect for State sovereignty also weighs heavily against imposing any jury requirement on revocation hearings. "Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status." *Ice*, 555 U.S. at 170. This Court has "long recognized the

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[6] Nearly all (44) States today have parole boards. Schwartzapfel at 80; *see also* Rhine et al. at 280.

role of the States as laboratories for devising solutions to difficult legal problems," and refuses to "diminish that role absent impelling reason to do so." *Id.* at 171. Indeed, this Court does "not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson*, 432 U.S. at 201-02.

Helping offenders to reform while also protecting public safety might be the most persistent and vexing criminal-law problem States face. To date, no one has figured out the "right" or "best" way to reintroduce offenders into society while minimizing recidivism. *See generally* Michael Tonry, *Sentencing in America, 1975-2025*, 42 Crime & Just. 141 (2013) (discussing past and current approaches to punishment and supervision). Each jurisdiction seeks to balance these interests well, and in its own way.

Imposing a jury requirement, however limited, at revocation hearings could affect State law in two ways. First, it could reduce the use of determinate sentencing. Under *Apprendi*, indeterminate sentencing schemes are less problematic than determinate schemes—such as those at issue in *Blakely* and *Booker*—because they essentially remove judicial factfinding from the equation. *See Blakely*, 542 U.S. at 308-09. Faced with the potential costs of a second, post-sentencing jury system, a State might abandon determinate sentencing simply because it is not worth the trouble—even if that State's experience shows it to

be more effective or otherwise politically preferable.[7] Indeed, even if the federal sentencing scheme in this case were characterized as a form of indeterminate sentencing, States would still have an incentive to change their schemes to mitigate the risk of jury involvement post-sentencing. Second, and relatedly, States would have an incentive to increase the top range for offenses—even if they did not think that a given offense warranted such a top—because it would restore judicial discretion without the costs of running a jury-revocation system.

3. Finally, a jury system for revocation proceedings would be difficult to administer. *See Ice*, 555 U.S. at 172; *cf. Morrisey*, 408 U.S. at 490 ("We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements set out above . . . should not impose a great burden on any State's parole system.").

There are nearly 4.5 million offenders on some form of State supervision. *See* Bureau of Justice Statistics, *Probation and Parole in the United States, 2016*, data tables, https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6188 (last visited Dec. 12, 2018) (4,405,400 total State supervision population). Recidivism rates for offenders stand at about 67% within 3 years. *See* Bureau of Justice Statistics, *Reentry Trends in the U.S.*, https://www.bjs.gov/content/reentry/recidivism.cfm (last

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[7] As of 2015, 17 states and the District of Colombia had primarily determinate sentencing schemes. National Conference of State Legislatures, *Making Sense of Sentencing: State Systems and Policies* (June 2015) at 4-5, available at http://www.ncsl.org/documents/cj/sentencing.pdf (last visited Dec. 12, 2018).

visited Dec. 12, 2018) (as of 2014, "over two thirds of released prisoners were rearrested within three years"). Based on new arrests alone, the States likely hold *millions* of revocation proceedings each year. And this does not account for the many hearings based on non-criminal violations, such as failure to pay restitution. *See, e.g., Bearden v. Georgia*, 461 U.S. 660 (1983).

If the Court holds that the Constitution requires juries to decide a portion of those cases, the number of jury revocation proceedings could outstrip the number of criminal trials—by an order of magnitude or more.[8] That would make juries more commonly used *after* criminal trials than *in* them. Though *amici* were not able to find good data quantifying the costs of jury proceedings, it is certainly substantial. Adding more to that total cost (by requiring sanctions juries) could be more than State fiscs could bear. At a minimum, it would eviscerate the States' "overwhelming interest in being able to return the [convicted] individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." *Morrisey*, 408 U.S. at 483.

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[8] As of 2007, the States collectively conducted nearly 150,000 jury trials annually. *See* Hon. Gregory E. Mize, Paula Hannaford-Agor, & Nicole L. Waters, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*, 7, (2007), available at https://bit.ly/2TjKD6r (last visited Dec. 12, 2018).

CONCLUSION

This Court has long maintained—correctly—that Sixth Amendment rights do not apply in post-sentencing proceedings. For historical, sovereign, and practical reasons, this Court should adhere to those cases and not import those rights where they "do not belong." *United States v. Work*, 409 F.3d 484, 486 (1st Cir. 2005). This Court should reverse.

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